

No 141 and 496.

United States Circuit Court of Appeals
FOR THE THIRD CIRCUIT.

SEPTEMBER TERM, 1896.

No. 15.

PULLMAN'S PALACE CAR COMPANY,

Appellant,

vs.

CENTRAL TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN
DISTRICT OF PENNSYLVANIA.

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO
DISMISS THE APPEAL.

JOSEPH H. CHOATE,
Of Counsel for Appellant.



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First.

The only ground for the motion of which the appellant has received notice is that, prior to the taking of the appeal to this Court, the appellant had appealed from the decree to the Supreme Court of the United States, had perfected such appeal and obtained a supersedeas thereon. We submit that this

alleged ground affords no reason for dismissing this appeal; that under the provisions of the Act of March 3, 1891, establishing this Court, an appeal from a final judgment of the Circuit Court, upon the merits, can only lawfully be taken to one court; that is to say, that one court or the other has jurisdiction of the appeal, and necessarily, to the exclusion of the other court. If the case comes within Section 5 of the Act, there is no lawful appeal to this Court, but only to the Supreme Court. If, on the other hand, the case comes within Section 6, the only lawful appeal is to this Court, to the exclusion of the Supreme Court. But in a case of doubt in the mind of the appellant or his counsel, as to whether the case comes properly within Section 5, or within the provisions of Section 6, he is not thereby condemned to take the risk of losing his rightful appeal, but may properly, as we understand the established practice in such cases, take both appeals, leaving it for the courts upon whom the responsibility rests to decide the question of appellate jurisdiction. Whichever appeal is not allowed by the statute, is necessarily unlawful and of no effect; in other words, the case stands as if such appeal had not been taken. If the appeal first taken is not permitted by the statute, the taking it does not prevent the appellant from appealing to the other and proper court, or deprive that court of its rightful appellate jurisdiction. If the appeal in this case to the Supreme Court was not permitted by the statute, it is as if no such appeal had been taken, or as if such appeal had been taken to any other court to which no appeal was permitted, as, for instance, to the Supreme Court of Pennsylvania, or to the Court of Appeals of the State of New York.

The appellant is not, *in a case like the present*, put to any *election* at the peril of losing all his rights and determining for himself finally the doubtful question of jurisdiction. It is a mere question of doubt as to the *appellate* court which has jurisdiction

of the *appeal*. A careful examination of the cases, hitherto decided under this Act, will discover no authority for the monstrous proposition that in such a case of doubt there is any such thing as an election required. There is nothing to elect.

The statement in respect to an election being imperative upon the appellant, or upon the party cast in the judgment, made by Mr. Justice LAMAR, in *McLish v. Roff*, 141 U. S., p. 661, relates only to the question of election between the special appellate jurisdiction given to the Supreme Court, *in a case in which the jurisdiction of the Court of first instance is in issue*, and an appeal upon the merits to the Circuit Court of Appeals. In that case *either* appeal would be valid, as the party might elect. Not so here, where only one appeal is valid, and the other appeal must necessarily be unauthorized, void and of no effect.

The case of *Hurst v. Hollingsworth*, 94 U. S., 111, is analogous to the case at bar. The question there was whether an appeal or a writ of error to the Supreme Court should be thrown out, *both* having been taken. Just as in this case, the question for the appellant was, which mode would be the valid and effective way of securing a review. The Court refused to dismiss the cause on motion, and Mr. Chief Justice WAITE, delivering the opinion of the Court, said:

“These motions are all denied. There was but one action in the court below, and there is but one record. When the transcript of that record was brought here by Hurst, his cause was docketed. It is not necessary to enter it twice, because, out of abundant caution and to guard against a possible chance of dismissal, he has brought it here in two ways. He has but one cause; and when we come to examine it we will determine whether it is properly here by appeal, or by writ of error, and will proceed accordingly.”

This case was cited with approval in the subsequent case of *Plymouth, &c., Company v. Amador*,

&c., *Company*, 118 U. S., at page 269, where the Court said:

“There was but one action in the court below and there is but one record, the appeal and writ of error bring up but one order or judgment for review, and there is, therefore, but one case here.”

Second.

But assuming the motion of the appellant, upon the single ground upon which it is placed for a dismissal of the appeal to be thus disposed of, this Court may naturally find itself, by the mere fact of the existence of the two appeals in this case, constrained at the outset of the hearing to determine the question of appellate jurisdiction, and may naturally expect from the appellant the reasons which led it to take the two appeals. We therefore proceed to state those reasons, leaving it for the Court to determine what disposition shall be made of the dilemma thus raised—whether finally to dispose of the question itself, or, in the exercise of the power given it by Section 6 of the Act, to certify to the Supreme Court of the United States the question of jurisdiction alone, or that and all the other propositions of law involved in the case, for its instruction. The situation for the appellant is a very serious one, for if this Court should decide upon the record that it had no jurisdiction of the appeal under the terms of the act, and throw the appellant out of Court for that reason, and afterwards the Supreme Court of the United States should decide that *it* had no jurisdiction under the terms of the act, and so throw the appellant out of its precincts, the disposition in both cases would be subject to no appeal, and the appellant, although having all the merits of the case, would lose his review altogether unless the Supreme Court by *certiorari* should call up the case. It was believed

by the counsel for the appellant, that the appellate jurisdiction on this record belonged to the Supreme Court of the United States, or, at any rate, that the question rested in so much doubt, that it was for the Courts alone, and not for counsel, to take the responsibility of determining it. They did not dare take the responsibility of not appealing to the Supreme Court, and run the risk of this Court's determining that it had no jurisdiction.

By Section 5 appeals are to be taken from the Circuit Courts direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States, and in any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Both of these phrases or clauses of Section 5 of the statute are wholly new, so far as we can discover, not being found in any previous judiciary act or in the Constitution of the United States, and what they mean is necessarily a subject for judicial determination, and, we believe, for the determination of the highest court of the nation.

In this case, two questions arose which seemed to appellant's counsel to involve the construction, or at least the application, of the Constitution of the United States, and under one of these questions, a statute of the State of Pennsylvania was claimed to be in contravention of the Constitution of the United States, and decided by the Court not to be so. In respect to this latter clause of Section 5, it must be noted that the appellate power of the Supreme Court under former judiciary acts has been grounded upon what was decided by the Court below, but no appellate jurisdiction was given to the Supreme Court simply because the law of a State was *claimed* to be in contravention of the Constitution of the United States, as provided in the act of 1891. By this we understand that Congress intended "*claimed*" *not necessarily by the Court, but claimed by the party*, such claim being overruled by the decree of the

Court. The obvious purpose of Congress was to reserve to the Supreme Court the largest possible appellate jurisdiction in all Constitutional questions.

The first question referred to, which was believed to involve the construction or application of the Constitution of the United States, was this: The appellant had abandoned its original bill, had moved as a matter of right for its dismissal, all the equitable elements of the bill having been eliminated by the decision of the Supreme Court in a former case between the same parties, but the Court compulsorily retained the appellant within its power, for the purpose of enabling the appellee to file a cross-bill for the recovery of the property of the appellee in the possession of the appellant, and damages for its retention or use. The appellant being required, after all its objections had been overruled, to answer the cross bill, *by its answer* took the ground that *by the Constitution of the United States, and by the act of Congress applicable to the case, the appellant was entitled on that question (the question being purely the question of legal title and legal damages) to a trial by jury*, and that the Court had no power to proceed to the trial of those questions in equity, simply because it already had jurisdiction of the parties in the case. In spite of such objection, so set forth in the answer, based upon the Constitution of the United States, and invariably insisted upon, the Court proceeded to assess, damages, and thereafter entered a money decree for damages, exactly as a court of law would do, but without a jury, whereby the appellant, as we believe, was deprived of his constitutional right. If, in this aspect of this question, the case did not involve the construction or application of the Constitution of the United States, we are at a loss to determine how such a case could possibly arise.

Since this appeal was taken to the Supreme Court, that Court has decided, in the case of *Smith v. McKay*, 161 U. S., 355, that it has not jurisdiction under Section 5, in a case where the defendant in

equity pleaded that the plaintiff had a complete and adequate remedy at law, and that the appeal should be dismissed, holding that the point so raised did not go to the power of the Court to proceed in the cause, but only to the want of equity in the bill. We submit, however, that a careful reading of that opinion will show that it wholly fails to reach the case where a plaintiff in equity, not content with pleading the want of equity in a *cross-bill* like the present, appeals to the Constitution for the right of trial by jury expressly provided for him in the given case, and we submit that there is a wide difference between the case referred to, and the record now brought before the Court, where the appellant did so expressly and specifically throw itself upon the Constitution. It does not appear from the report of the case referred to that any reference was made to the Constitution of the United States. It was merely a plea in equity that there was no equity in the bill, which, as the Court said, would throw almost every case in equity within the appellate jurisdiction of this Court. This, certainly, was not the intent of Congress in enacting the law. Where a party has a constitutional right, demands it, and is deprived of it, by exercise of compulsory power on the part of the Court, a case, we think, is made which involves the construction, or at least the application, of the Constitution of the United States.

The other question which appellant's counsel believe involved the application of the Constitution of the United States, and in respect to which certainly the law of a State was *claimed* to be in contravention of the Constitution of the United States, arose in this way: The general question on trial was the value of the property of the appellee at the time it was taken into the possession of the appellant under a void and illegal contract. Among its properties there were certain contracts with railroad companies which, by their terms, ran during the continuance of the incorporation of the party of the first part,

the appellee. These contracts all expired on December 30, 1882, which was the then existing limit of the term of the incorporation of the appellee. In 1870, prior to the making of the void lease, the State of Pennsylvania, at the instance of the appellee, passed an act extending the term of its corporate existence for ninety-nine years from the expiration of its existing charter. The point of controversy in respect to these contracts was, first, whether they could be included at all in the assessment of damages; and, second, if they were to be included, whether they were to be valued as contracts expiring in 1882 or continuing for ninety-nine years beyond that date. No assent of the railroad companies to any prolongation of the contracts was claimed or pretended, but the Master held, and the Court affirmed his report so holding, and his conclusion, that the legal effect of the statute of Pennsylvania referred to, was to convert these contracts, for the purpose of assessment of damages, in this case, at any rate, into contracts for the ninety-nine years additional, which of course made them of very different value.

The appellant, in his exceptions to the Master's report, contended that the statute of Pennsylvania could have no such effect, because it was prohibited by Clause 1 of Section 10, of the First Article of the Constitution, from passing any law impairing the obligation of contracts, and that this constitutional provision necessarily made it impossible to give such legal effect to the statute in question; but the judgment stands upon the theory of the proposition so held by the Master, and affirmed by the Court. The Court concluded that these contracts were existing and valid contracts in 1885, for the prolonged term, although by their original tenor, and if left to themselves, they would have expired in 1882. Appellant's counsel were of opinion that in respect to this question, the case involved the construction or application of the Constitution of the United States, and that also in the case a law of a State was

claimed to be in contravention of the Constitution of the United States. It was certainly so claimed on the part of the appellant. Legal effect was given to it contrary to such claim, and in the teeth of the constitutional provision, both by the report of the Master and the judgment of the Court.

Appellant's counsel, therefore, did not feel that the rights of their client would be properly protected without taking an appeal from the decree, under the fifth section, to the Supreme Court of the United States.

The importance of the question of jurisdiction thus presented cannot be overestimated. In this present case, it is of immense importance to the party not to fail of his rightful appeal, whichever it be.

Upon inquiry, appellant's counsel were informed by the Clerk of the Supreme Court of the United States that it is the habitual practice of the Government, through the Department of Justice, in cases of doubt, to take two appeals, leaving it to the Courts to decide which is the right appeal; and it was also learned that it has been usual for the Circuit Court of Appeals, when such a case arises, to certify the question to the Supreme Court, or to await in some way or other the decision of the Supreme Court upon a question which necessarily involves its powers, as well as the powers of the Circuit Courts of Appeals.

The case contains other matters, which, if this Court should determine, in the exercise of the power given to it by the sixth section, to certify to the Supreme Court of the United States the question of appellate jurisdiction, might not improperly go to that Court at the same time.

In the former case between these parties, decided by the Supreme Court of the United States, it was held that the contract of lease made between them in 1870 for ninety nine years was void, and, it being beyond the power of the appellee to make it, was invalid as against public policy.

At the time of this decree the parties had been proceeding under the contract for fifteen years, and they were left by the decree in the position which the record shows them to have been in at the time of the filing of the cross-bill, which is the subject of the controversy here.

The questions involved in this case seem intentionally to have been left open by the Supreme Court in its opinion in the former case, and almost every subject of controversy here involves the effect to be given to the decision of the Supreme Court in the former case, and the legal results flowing therefrom.

The appellants are prepared to present their full case upon the merits here, and to abide by the decision of this Court. They have no choice of tribunals, but are only desirous of obtaining a final and conclusive determination of the matters in controversy by the decision of the Court which has the appellate jurisdiction, and they therefore submit this memorandum, deeming it to be their duty to the Court to explain the exact situation which is shown by the record.

**ADDITIONAL MEMORANDUM SUGGESTED BY
APPELLEE'S BRIEF ON THIS
SUBJECT.**

The motion to dismiss is based upon a total misconstruction of Secs. 5 and 6 of the Act of March 3, 1891.

Where a party has an election of remedies, either of which is open to him, he may be put to his election and bound thereby when made.

As in the cases cited in Elliott on App. Proc., where a party may lawfully either file a bill to review a judgment or take an appeal to reverse it, he cannot do both; he must choose between them, take

one proceeding or the other. Having chosen one he must abide by that, and cannot afterwards take the other. This is the ordinary rule of election of remedies, and the reason of it is too obvious for discussion.

But as between the appeal to the Supreme Court, provided for by the 5th Section of the Act of March 3, 1891, and the appeal to the Circuit Court of Appeals provided for by the 6th Section, the party defeated in the Court below has no election. It is not open to him to take the one appeal or the other, as he may choose or prefer.

If the case is one provided for by Section 5, the Circuit Court of Appeals has no appellate jurisdiction, and no act of the party, and no assent of both parties, no action of the Circuit Court or of the Circuit Court of Appeals, or of any Judge of either, can give the latter Court any jurisdiction in the case.

So, if the case is one provided for by Section 6, the Supreme Court has no direct appellate jurisdiction, and nothing can be done by anybody to confer upon it such appellate jurisdiction.

In either case an appeal to the wrong Court, an appeal to the Court to which an appeal is not given by the act, differs in no respect from an appeal to any strange Court not mentioned in the act, as the Mayor's Court or the Probate Court, or any other State court.

In such a proceeding the appeal is only so much waste paper. It is a mere nullity. It cannot possibly oust the jurisdiction of the Court which has the sole and exclusive appellate jurisdiction.

The act makes it an utter impossibility for a given case to belong to both categories. Each given case belongs to one category alone, and is shut out from the other. And in the theory of the law of the act, there is no room for doubt as to the category to which any case belongs. The question in each case as it arises is capable of certain and absolute judicial decision.

The act necessarily assumes, therefore, that whichever Court passes on the question of appellate jurisdiction will pass upon it rightly according to the true and absolute meaning of the language of the act, and does not contemplate any legal possibility of the Supreme Court deciding the question one way and the Circuit Court of Appeals deciding it the other. Legal omniscience is necessarily imputed to both Courts.

But the suitor and his counsel have no such legal omniscience. They can but have an opinion, which is subject in every case to judicial decision. Doubt is open to them and is a necessary incident to their position and relation to the Courts. But because they are in doubt, the suitor cannot be deprived of his right to his rightful appeal. If in a case, the appellate jurisdiction of which belongs only to this Court, he appeals to the Supreme Court, it does not and cannot take the case into that Court, and this Court must assume that that Court will so decide. And if in the same case he appeals to this Court, this Court has the sole and exclusive jurisdiction and will decide the same question, and in legal theory will necessarily decide it in the same way.

But the legal theory of judicial infallibility may not, it is true, in every instance, hold good in practice. A case doubtful to the suitor and his counsel may be so doubtful as practically to admit of different decisions by the two Courts, in which possible instance, happily, the fixed relations of the two Courts and the special provisions of the act afford a prompt and effectual solution of all difficulty. This Court naturally defers to the judgment of the Supreme Court in such a dilemma, and may, and we doubt not will either suspend its decision on the question of appellate jurisdiction until the Supreme Court has had an opportunity to pass upon it, or certify the question, with or without other questions, to the Supreme Court for its instructions, as provided in

the 6th Section, "which instruction shall be binding on the Circuit Court of Appeals in such cases."

The two Courts will not, as the appellee in his brief seems to suppose, either seek or permit conflict between themselves on such a question. They can and will in all cases successfully avoid it by one or the other of the courses suggested. This Court will not seek or consent, as the appellee in his brief seems to suppose, to do wrong or injustice, or by any hasty action on its part to deprive the suitor in any possible event of his rightful appeal, and of the review of the judgment by the one Court or the other which has the sole and exclusive appellate jurisdiction over it.

But assuming the contrary, assuming the impossible contingency that this Court will seek or permit a conflict with the Supreme Court on the question of appellate jurisdiction, or will set itself up against the Supreme Court, the suitor is not even then left without an effectual remedy, for it will still under the provisions of the 6th Section "be competent for the Supreme Court to require by *certiorari* or otherwise the case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." And it cannot be doubted that the Supreme Court, in the almost impossible contingency supposed, would exercise that power freely and promptly, rather than suffer a suitor to be deprived altogether of his right to a review of the judgment on the merits. No Judge of any Federal Court, and no suitor therein, will impute to the Supreme Court any hesitation in the exercise of the power to do justice, and prevent injustice in such a contingency.

Thus the arguments against two appeals *ab inconvenienti*, so strongly urged by the appellee, are shown to be without foundation. We must assume that the Courts sit to do justice, and not to defeat it, to promote and uphold the rights of suitors, and

not by cunning devices and astute and technical contrivances to defeat them.

The 4th section of the act provides that "the review by appeal, by writ of error, or otherwise, shall be had *only* in the Supreme Court of the United States, or in the Circuit Court of Appeals, according to the provisions of this act regulating the same."

By the 5th section appellate jurisdiction is given to the Supreme Court alone, and exclusively—

"In any case that *involves the construction or application* of the Constitution of the United States.

"In any case in which the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States."

And it is conceded that if either of these constitutional questions or points arose in this case, the Supreme Court necessarily has the sole and exclusive appellate jurisdiction to review not only those questions, but all other questions and issues contained in the record. And it must equally be conceded that if neither of these constitutional questions is in the case, the Supreme Court had and could have no appellate jurisdiction, but that under the 6th section this Court alone has such appellate jurisdiction.

Being in doubt, but their doubt inclining to the belief that one or both of these constitutional questions are in the case, the appellant's counsel advised and took an appeal to the Supreme Court. They could not safely or properly have omitted to do so. The clauses by which the appellate jurisdiction of the Supreme Court is determined are utterly novel, and await the construction of the Courts, which has not been directed to them.

Still, being in doubt, and determined at all events to save the right of their client to a review of the judgment on the merits by whichever Court had the

sole jurisdiction, they advised and took the appeal to this Court.

The effort is now made by this motion to deprive us of this appeal, and if it shall be decided by the Supreme Court that the sole appellate jurisdiction was vested here, then it is claimed that we shall have no review upon the merits whatever.

The appellee's counsel first suggests that the appellant had an election of remedies, and could take either appeal as it chose, and having appealed first to the Supreme Court, is bound by that. We have already shown that by the necessary construction of the act he had no election.

This is the real basis of his argument. He recurs to it on page 25 of his elaborate brief thus:

"The appellant took an appeal to the Supreme Court, *which secured there a hearing of all the questions involved*, provided those questions included a question arising under the Constitution of the United States; but it also ran the risk that if those questions did not include a constitutional question, the Supreme Court must in the end dismiss the appeal without regard to the merits. *On the other hand appellant might have taken an appeal to the Circuit Court of Appeals, in which case it would have equally secured a hearing on all the questions involved, and could have had any constitutional question certified by the Circuit Court of Appeals to the Supreme Court. In the case of an appeal to the Circuit Court of Appeals appellant ran no risk of having its appeal dismissed without a hearing on the merits, as the Circuit Court of Appeals had in any event jurisdiction because of the questions involved other than constitutional questions. There were therefore two courses open to the appellant, one involving a risk of a dismissal without a hearing on the merits, the other involving no such risk.*"

This is all directly in the teeth of the express provisions of the statute.

If the case involves either of the constitutional questions named, the Appellate Court has the sole and exclusive jurisdiction to decide not only those, but all the questions in the record and all possible appellate jurisdiction of this Court is expressly excluded as absolutely as in prize causes, or convictions for capital or otherwise infamous crimes. So that it is not true that this Court "had *in any event* jurisdiction because of the questions involved other than constitutional questions," or that "by an appeal to this Court (assuming that the constitutional questions were involved) appellant would have equally secured a hearing on all the questions involved," or that "he could have had the constitutional questions certified to the Supreme Court," for in the case supposed, this Court would have no jurisdiction whatever, either to decide or to certify.

The words in the 6th section, "in all cases other than those provided for in the preceding section of this act," effectually and equally exclude from the appellate jurisdiction of this Court all cases provided for in the second, third, fourth, fifth and sixth clauses of the fifth section of the act.

The appellee further relies upon the cases of *McLish v. Roff*, 141 U. S., 661-665; *Maynard v. Hecht*, 151 U. S., 324-326, and *U. S. v. Jahn*, 155 U. S., 109, as authorities in support of his position. Those cases deal only with the exceptional case of the certified question of jurisdiction of the Circuit Court, when the appeal is held to be good for nothing without the certificate, which, of course, the party defeated may require or not as he chooses.

"This is not a case where the jurisdiction of the Circuit Court is in issue," and those cases have nothing whatever to do with the question here. They merely determine the construction of the first clause of the fifth section, and settle the practice as to the review of the single question of the jurisdic-

tion of the Circuit Court—having no relation whatever to the other clauses of Section 5.

In *McLish v. Roff*, the defendant had demurred to the jurisdiction of the Circuit Court, and his demurrer having been overruled, he took out a writ of error to the Supreme Court, *before final judgment*, and the only question decided in the case was whether the writ of error provided for by the 5th section could issue in any case except from the final judgment of the Circuit Court, and it was held that it was impossible that Congress, in view of the previous statutes, rules and practice, could have intended any such radical change, and that there was nothing in the provisions or language of the act to justify such a revolutionary idea.

It was in reference to the election, given as to the question of jurisdiction only after final judgment in the Circuit, to have the special question of jurisdiction certified to the Supreme Court, or, waiving that, to appeal on the merits to the Circuit Court, that the language quoted on page 18 of appellee's brief is used by Mr. Justice LAMAR, and it is in reference to the same limited matter of the certified question of jurisdiction that the same language is repeated in the other cases referred to.

But the Court in *McLish v. Roff* is very careful to say (p. 666) that the act "*provides for the distribution of the entire appellate jurisdiction of our national system between the Supreme Court of the United States and the Circuit Court of Appeals therein established, by designating the classes of cases in respect of which each of those two Courts shall respectively have final jurisdiction.*"

The Supreme Court by its decisions has defined the case provided for by the first clause of Section 5 to be the case, if and when the question of jurisdiction is certified up with a writ of error. Then the

Supreme Court gets jurisdiction to decide that question alone. If no such question is certified (and it is for the party to require such certificate or not as he chooses), and the case does not come within any of the other five clauses of Sec. 5, then the appellate jurisdiction belongs to the Circuit Court of Appeals, under Section 6, being one of the "cases other than those provided for in Section 5."

Chappell v. U. S., 160 U. S., 508.

Maynard v. Hecht, 151 U. S., 324.

But when we come to the other five clauses of the 5th section these decisions have no application, and could by no possibility have been intended to have any.

Appellee's counsel emphasizes the word *may* in the first line of Section five in the sentence, "That appeals or writs of error may be taken from the existing Circuit Courts direct to the Supreme Court in the following cases," intimating but not expressly claiming that the use of the word *may* made the appeal direct to the Supreme Court optional in all cases stated in Section 5, leaving it to the choice of suitors to desert the Supreme Court altogether and to leave it nothing whatever to do on direct appeal, but only to exercise a supervisory jurisdiction on questions propounded to it for instructions by the Circuit Court of Appeal, or called up by it from those courts by *certiorari*. But the object of the act, to distribute the final jurisdiction between the two courts by designation of classes of cases, absolutely forbids such an idea, and the fact that by the sixth section the appellate jurisdiction of the Circuit Court of Appeals is expressly limited to "cases other than those provided for in the preceding section of this act," that is to say, to cases in which the Supreme Court has not by the 5th section appellate jurisdiction, is equally fatal to the suggestion.

Again, the appellee's brief (p. 25) cites another passage from Mr. Justice LAMAR's opinion in *McLish*

v. *Roff*, which will bear no such application as is there intended to be given to it. He was there treating of the precise point raised by the appeal, whether there could be such a thing under the first clause of Section 5 as a writ of error, *before final judgment*, and was answering the point made that in the 6th section the word *final* was omitted, and all that he meant and all that he said in the passage cited was, that if a writ of error could be taken before final judgment in the case where the question of jurisdiction was certified, it must be allowed in the same way in all the other cases provided for in Section 5 in respect to which the word "final" was not employed.

But there is another conclusive answer to the argument sought to be raised from a misapplication of what was decided and said by the Supreme Court in *McLish v. Roff*. The fifth section of the act in its second and third clauses provides for a writ of error on appeal to the Supreme Court from the final sentences and decrees in prize causes, and "in cases of a conviction of a capital or otherwise infamous crime." And these two classes of cases are in exactly the same category as the cases in which constitutional questions arise, specified in the fourth, fifth and sixth clauses. All alike are in the language of the sixth section, "Cases provided for in the preceding section of this act," and all of them alike are excluded from the appellate jurisdiction of the Circuit Court of Appeals, which is expressly limited to cases "*other*" than those.

What would be thought of the proposition that, under the precise and well defined language of Sections 5 and 6, the defeated party in a prize cause, or a party convicted of a capital or otherwise infamous crime, had an election by force of the word "*may*" in Section 5 to appeal or take a writ of error either to the Supreme Court or to the Circuit Court of Appeals, and that an appeal wrongly taken to this

Court would defeat his rightful appeal to the Supreme Court? It would be scouted as preposterous.

But the claim made by the appellee on this motion is equally preposterous. When a party appeals to the Supreme Court under either of these five clauses, he does not appeal on any limited question but on the whole case, and the Supreme Court gets jurisdiction of the whole case, to the exclusion of this Court.

The Supreme Court has repeatedly held that upon an appeal or writ of error authorized by the 4th, 5th and 6th clauses of Section 5, it acquires jurisdiction to determine not the constitutional question alone, but also all the questions in the case. In the language of that Court itself it "has jurisdiction of the case, the power to dispose not merely of the constitutional question, but of the entire case including all questions." This entire jurisdiction it gets and can only get upon the 5th section of the act. Thus the case is one provided for by the 5th section, and the necessary effect of the language of the 6th section is to exclude the Circuit Court of Appeals from appellate jurisdiction in those cases, and to forbid all idea of option or election between them.

Chappell v. U. S., 160 U. S., 509.

Nishimura Ekin v. U. S., 142 U. S., 651.

Homer v. U. S., 143 U. S., 577.

Finally, the appellee relies in support of his motion upon a decision of the Supreme Court of Louisiana, arising under some statute or constitutional provision not cited or referred to, which seems to hold that under a system distributing the appellate power between two appellate courts, an appeal to one pending and undisposed of requires the dismissal, on motion, of an appeal to the other.

This decision, if it went to the length claimed, would have no authority here. The Federal Courts are not in the habit of resorting to the practice or decisions of State Courts under different statutes

and different systems of law for the construction of acts of Congress or the regulation of Federal practice.

But further it appears from the record of the case itself, as set forth in the appellee's brief, that the same Court has decided the same question both ways; in fact, twice the other way. Once in *Bennett v. Creditors*, and again in *Henry v. Tricon*.

But, again, the case relied on does not hold that under a statute distributing appellate jurisdiction between two appellate courts, the party aggrieved and in doubt may not appeal to both courts; it does not hold that he is driven to an election at the risk of losing his right of appeal altogether. It does on the contrary hold that he may take both appeals, and the decision comes down to the extremely narrow and technical point of the State or local practice, that the second appeal must be dismissed, if it is "*lodged*," whatever that may mean in Louisiana practice, before the first appeal is disposed of, and even then the Court only dismissed it *provisionally, without prejudice to the new appeal, after and in case the first appeal to the other appellate Court should be disposed of*.

In *Bennett v. Creditors* the Court held:

"The first appeal prosecuted was a nullity and the second legal and valid. It was in force and could be prosecuted in accordance with the order granting it. Because the other order obtained at the same time was null and void it could not affect the order of appeal returnable to this Court."

"If this case stood in like position we should pursue the same course."

Again (Brief, p. 23):

"We have gone very far, possibly too far, in permitting such radically inconsistent pleading as the taking of two self-contradictory orders of appeal from the same judgment to two different courts at the same time. No

express provision of law sanctions such a practice, and we have given it our approval only to relieve parties from the responsibility of deciding in advance doubtful questions of jurisdiction, and to relieve them from the unfortunate consequences resulting in case the order of appeal first returned and presented for action should be annulled for want of jurisdiction."

Thus, the Court treats it as a mere question of local practice. It seems that there the order of appeal is the fundamental step in the appeal which saves the right; all that follows is mere practice, not to allow the second appeal to be *lodged* before the first is disposed of. But the order of appeal to save the right of the party is unknown in Federal practice. A perfected appeal is all that can save the right, and, according to the analogy of the two positions so far, the case cited would seem to be authority for the position that whatever is necessary to save the right of appeal may be allowed simultaneously to both appellate courts, withholding the second from final lodgment till the first is disposed of.

The grounds on which their very technical ruling under their practice is based have no application to appeals under the Act of Congress of March 3, 1891. There it was not treated as a question of appellate jurisdiction, but only as one of pleading. Here the sole question is that of appellate jurisdiction. If the one court has jurisdiction, the other has not, and the appeal to it is a nullity. Our proposition here under this Federal judiciary act does not involve "the philosophical impossibility of two bodies occupying the same place at the same time." Under our Federal system and under this act of Congress, for this Court to entertain jurisdiction of the appeal to it, would not be in effect to order a dismissal of the appeal to the Supreme Court, in advance of a determination by that Court of its own jurisdiction. It

certainly is not true under this judiciary act, that the appellants, by invoking the appellate jurisdiction of the Supreme Court, have created jurisdiction in that Court in spite of the act, or that it must submit to any such non-existent jurisdiction. It *does* lie in our mouths under the Federal system to raise the point of jurisdiction of the Court before which we are at any stage; and this Court can decide that it has jurisdiction under the fifth section of the act, and that the Supreme Court has none, although by the modes pointed out already, it may properly avoid the necessity of doing so, and may leave that question to be decided first by the Supreme Court.

It is not true that a second appeal to another court after an appeal by the same party to the first court would create the anomaly of each having *a right* to enter a decree and enforce it. It is only the Court which, under the act, has the sole and exclusive appellate jurisdiction that can render and enforce a final decree on the merits between the parties. The other court can only decline to entertain the appeal and must dismiss it.

Nor is it true that, by taking two appeals, the appellant can secure any delay not contemplated by law. For instance, in this case the appeal was taken within the six months allowed by law. * Had the appellee so chosen he might have moved in March last to dismiss our appeal to the Supreme Court, if he thought it had no appellate jurisdiction. And if his motion had been granted he could have the merits finally disposed of at this term of the Circuit Court of Appeals, the first term sitting at which it could be reached.

We, of course, do not claim that this Court is bound to suspend its proceedings until the Supreme Court has had an opportunity to pass upon the question of appellate jurisdiction, or to certify the question for instruction. We shall be perfectly content to have it go on and decide all questions in the cause. We have only suggested what we believe to

be the orderly and regular course of Federal procedure.

We further deny the statement in appellee's brief that our application for a writ of error to the Supreme Court was opposed and argued.

What was applied for was a special order allowing the appeal. The appellee's counsel denied that any constitutional question was involved, but admitted that if such question existed, the alleged right of appeal to the Supreme Court would be absolute and not dependent on the assent of the Circuit Court. The Court decided that Court had no authority under the statute to allow or disallow such appeals; that the appeal, if warranted by the statute, was of right, and refused to grant a special allocation, leaving the appellant to decide for himself (Record, p. 1199).

JOSEPH H. CHOATE,
Of Counsel for Appellant.

No. 141nd 496.

JAN 31 1898
JAMES H. MCKENNEY,
CLERK

Brief of Isham, Wintersteen & Choate
United States Supreme Court.
for Appellant.

October Term, 1897.

Filed Jan. 31 1898.
No. 141

PULLMAN'S PALACE CAR COMPANY,

Appellant,

vs.

CENTRAL TRANSPORTATION COMPANY,

Appellee.

No. 496.

PULLMAN'S PALACE CAR COMPANY,

Petitioner,

vs.

CENTRAL TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF AND ARGUMENT OF EDWARD S. ISHAM,
FOR APPELLANT.

A. H. WINTERSTEEN,
EDWARD S. ISHAM,
JOSEPH H. CHOATE,

Counsel for Appellant.



United States Supreme Court,

OCTOBER TERM, 1897.

PULLMAN'S PALACE CAR COMPANY,
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PULLMAN'S PALACE CAR COMPANY,
Petitioner,

VS.

CENTRAL TRANSPORTATION COMPANY.

No. 496.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF PENN-
SYLVANIA.

**ARGUMENT OF EDWARD S. ISHAM FOR
APPELLANT.**

Statement.

The only subject of controversy here is the legal effect to be given to the judgment of this Court in the case between the same parties, and founded on the same contract, which is reported in 139 U. S., 24. From the standpoint of the appellant it may be said that the fundamental question is whether effect is or is not to be given to that judgment.

In that case the Court held void a contract between these parties, called a lease, because the lease itself was *ultra vires* of the lessor, the Central Transportation Company, and because covenants of that company in it were *in violation of public policy*. This appeal is from a decree in favor of the lessor in that lease for \$4,235,044, upon the prayer of its cross-bill for an accounting for the value of property transferred and contracts alleged to have been assigned in performance of the lease and for its purposes, and for earnings, and for the value of the business of the lessor alleged to have been lost or destroyed by effect of the lease and of the acts of transfer and assignment in performance of it.

That contract of lease is shown in the Record at page 23. The case in which it was held void (*Cen. Trans. Co. vs. Pullman's Palace Car Co.*, 139 U. S., 24), was an action at law for the collection of a quarterly installment of the annual payment, called a rental, covenanted to be made to the Central Company. The Court refused to enforce the covenant, because the contract which contained it was unlawful.

As elementary factors in this argument, we may give distinctness to the elements of that contract by reason of which this Court held it illegal and therefore void. They were three:

FIRST.—That it was technically *ultra vires* of the Central Transportation Company, the lessor, that is, it was beyond the powers conferred upon that company by the legislature.

SECOND.—The undertaking of that company was also a *violation of public policy* in that "it involved an abandonment of its duty to the public," for it undertook to transfer, for a period, "nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties to another corporation," and the "real purpose of the transaction was

under the guise of a lease of personal property, to transfer" nearly its "whole corporate franchise, and to continue its existence for the single purpose of receiving compensation for not performing its duties."

THIRD.—There was strong ground also for holding that the covenant of the Central Transportation Company, the lessor, that it would not, during the term of the lease, engage in the business for which it was incorporated, made the contract between the parties void, "*because in unreasonable restraint of trade, and therefore contrary to public policy.*" * * * A contract by which a corporation chartered to perform the duties of a common carrier, "*or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for ninety-nine years, is clearly unreasonable and void.*"

This Court specified with precision the several illegal elements because of which it held the lease to be void. It said:

"In short, the plaintiff not only parts with all its means of carrying on the business and of performing the duty for which it had been chartered, of transporting passengers and making and letting cars to transport them in, but it undertakes to transfer, for ninety-nine years, nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation, and to continue in existence during that period for no other purpose than that of receiving, from time to time, from the other corporation the stipulated rent or compensation, and of making dividends out of the moneys so received.

"Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal in the indenture itself

of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using, or hiring sleeping cars, and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

"The necessary conclusion from these premises is that the contract sued on was unlawful and void, *because it was beyond the powers conferred upon the plaintiff by the Legislature, and because it involved an abandonment by the plaintiff of its duty to the public.*

"There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and *therefore contrary to public policy.*
* * * A contract of a carrier, whether an individual or a corporation, not to carry passengers or goods over a particular route, may be reasonable and valid (*Pierce vs. Fuller*, 8 Mass., 223; *Falmer vs. Stebbins*, 3 Pick., 188; *Leslie vs. Lorillard*, 110 N. Y., 519). But a contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, *agrees that it will not perform those duties at all, anywhere, for ninety-nine years, is clearly unreasonable and void.*"

The contract of lease, therefore, was held unlawful, *not only* because technically *ultra vires*, but also because in *two* distinct particulars, *in violation of public policy and of public duty.*

As all the controversy in this case occurs under the canopy of this cross-bill, and as the cross-bill can find jurisdiction in the Federal Court only as it is an outgrowth of the original bill of the Pullman Company, and by reason of its connection with

operative equitable elements of that bill, it is *imperatively necessary to consider, first*, the subject, and *purpose* concerning the lease, of the original bill; *second*, the *effect* upon that bill of the judgment which held the lease to be void, and *third*, the effect of its abandonment by the complainant, who moved its dismissal.

Then, as it is contended that the cross-bill was allowed to be filed in direct opposition to the rules of procedure and the precedents of the Court; that it is in no respect a cross-bill, but is distinctively an original bill; that as an *original bill* the courts of the United States have no jurisdiction of the parties; that as a *cross-bill* the Court of Equity can take no cognizance of its subject-matter; that moreover no court of either law or equity can give the relief sought by it, it is *imperatively necessary* to consider the subject and *purpose* of the cross-bill and its relation to the original bill and to the judgment of this Court upon the lease.

We may then inquire: What justification can be found for the decree below?

The original bill; its subject and purpose.

When this bill was filed a judgment at law on the covenants of the lease had been already rendered against the complainant for the first installments of rent accruing in 1885. This judgment had been appealed from, and subsequently, in this Court, it was reversed (*Pull. Pal. Car Co. v. Cent. Tr. Co.*, 139 U. S., 62). Other actions at law for subsequent installments of rent were pending, and in the latest one, begun September 21, 1886, the invalidity of the lease was specially pleaded, and in that case it was held to be void (*Cent. Tr. Co. v. Pull. P. C. Co.*, 139 U. S., 24).

The original bill was filed January 25, 1887, after entry of the judgment for rent above mentioned,

and pending the appeal therefrom. It was filed in support of the lease, and sought the aid of the Court in giving affirmative execution to certain provisions of the lease itself which are given in the note below.* Under specified circumstances they authorized its modification or its termination, but provided, in case of such termination of the lease, for the restoration of the demised property. Upon this subject the provisions were numerous and specific, and restoration strictly conforming to the terms of the lease had become impossible. The bill, therefore, alleging *an election declared in June, 1886 (Rec., p. 35), to terminate the lease*, prayed the aid of the Court in a substantial instead of a literal performance of the requirements of the lease in that particular. Such was the burden of the bill.

The bill also averred as an additional ground for equitable relief, that the complainant had, in January, 1885, been dissuaded by the defendant from its *then* declared purpose to terminate the lease, and had been induced to adopt the other alternative of paying the defendant an equitable share of the revenues that might be realized under the lease; that this had been then agreed to by the defendant and the agreement afterwards repudiated; and it prayed that the Court *would decree whether* the election to pay a share of the net revenues instead of terminating

* "EIGHTH.—In the event that any of the railroad companies mentioned in the assigned contract shall at any time during this agreement refuse to permit the cars of the second party to be run on and over their respective lines of roads, so that by reason of such prevention or refusal the profits, income, revenue derived from and under any other and remaining contracts with other and remaining railroad companies mentioned in the assigned contracts, shall fall below the sum of two hundred and sixty-four thousand dollars (\$264,000), then and in that event said second party shall have the right either to declare this contract null and void, and surrender to said first party the said hereinbefore-demised property, or shall and will pay in like manner, in lieu of the said sum of two hundred and sixty-four thousand dollars (\$264,000), such sum or share of the net revenues from the remaining lines of roads as the parties hereto may at that time agree upon."—*Pullman's Pal. Car Co. vs. Cent. Trans. Co.*, 139 U. S., 63.

said lease *was not conclusive upon* both parties thereto. *If not* so binding, it prayed that the act of termination declared in June, 1886, *might relate back* and take effect from January, 1885.

Upon these grounds and these only the complainant moved upon the bill and certain affidavits for injunction against the bringing of suits at law for installments of rent accruing subsequent to its election, declared in June, 1886, to terminate the lease, and *also* for injunction against the further prosecution of the suits pending for the installments of rental which accrued *prior* to that declaration of election and subsequent to January, 1885; and prayed for a receiver (Record, p. 22) to take possession of the cars or other property which the complainant had received under the lease and could still restore.

The bill stated incidentally to the Court the advice of counsel which the complainant had received that the lease itself was invalid, and not enforceable by either party. It did not insist or aver that the lease was void for illegality, *it did not repudiate it or disaffirm it, or refuse on that ground to pay rental or otherwise to perform its terms.* It contained no prayer that it should be held void. It stated the advice of counsel and submitted that matter to the Court, but its attitude upon the subject was entirely passive. The clauses upon that subject are in the record at page 20. They were accorded no significance and engaged no attention in the Court below until this part of the bill was suddenly—after the lease had by this Court, in another case, been held void, and after the complainant had moved to dismiss the bill—seized upon and magnified into new proportions for the sake of support for a cross-bill which the defendant then sought to present. It was caught upon as the only link by which the cross-bill could be apparently connected with any subject matter of the original bill; and this may be thought important in other stages of this argument.

That these clauses were accounted no essential part of the bill when the bill and *the purpose* of it were under consideration by the Court, but as quite incidental and subordinate to its actual purpose and scope, seems indicated by the record. With great deference, however, a singular misapprehension seems now to appear upon that point. The Court by its order on the application below for injunctions made *no question* of the *validity* of the lease, but treated it as valid; for it *enjoined* suits for rent accruing after July, 1886, but declined to enjoin those for rent accruing before that date, for the reason, as it held, that the matters of defense suggested, relating to the election made in January, 1885, and the proposed termination of the lease then, would be equally as available in the suits at law as in equity. It also refused the appointment of a receiver.

Now rent accruing after July 1, 1886, would be rent accruing *after* the *election* to terminate the lease, and would be barred by that election. But the *invalidity* of the lease would be as good a defense at law to an action on the lease for that rent as for any other. The ground of distinction seems obvious.

In the opinion of BUTLER, J., filed December 14, 1891 (Rec., p. 552), denying the motion of the complainant to dismiss the original bill and allowing the cross-bill to be filed, the incidental suggestion of the bill upon the *subject of the validity* of the lease is first given prominence. And, in view of the indications of the Record, we are entitled to question the accuracy of the light in which that *subject* is presented. The opening sentence would indicate that it constituted the *leading purpose and chief burden of the bill*; and the Judge says that the Court declined to enjoin an action then pending, brought to recover rent previously due, "*because the question of validity raised could be interposed and decided on the trial thereof.*" The same suggestion is found again in the opinion of the same

Judge referring this case to a Master, in the Record, page 1128. The order of the Court, made on the 28th of April, 1887, is found at page 104 of the Record, and is shown in the foot note.*

Subsequently, after *proofs* had been taken of the action of the defendant *in inducing the complainant to forego the termination* of the lease in January, 1885, and to *elect instead thereof* to pay under the lease a share of net earnings, the motion for injunction against the prosecution of suits for rental accruing between January, 1885, and July, 1886, was renewed. The grounds of that motion, the action of the Court, and *the considerations upon which it acted*, seem to be shown without ambiguity in the opinion of Mr. Justice BRADLEY, which was filed March 2, 1888, and is found in 34 Fed. Rep., 357, and in the Record at page 541. The matter was heard before Justice BRADLEY, Judge McKENNAN and Judge BUTLER.

Justice BRADLEY, in his opinion, said:

“Upon the renewed application for an injunction in this case we do not think that any

* *Decree of Preliminary Injunction.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT
OF PENNSYLVANIA.

PULLMAN PALACE CAR CO.

vs.

CENTRAL TRANSPORTATION CO.

Oct. Sess., 1886, No. 44.

And now, April 28, 1887, this cause having come on to be argued upon motion for preliminary injunction upon bill, answer and affidavits, the answer being read as an affidavit; and the Court being fully advised in the premises, it is, upon due consideration, ordered that a special injunction issue restraining the Central Transportation Company from further prosecuting against the said Pullman Palace Car Company the suit at law in the Circuit Court of the United States, No. 75, October Sessions, 1886, and from instituting or prosecuting any other suit for *rent accruing after the 1st of July, 1886, under the lease of February 17, 1870, described in the bill of complaint*, and the injunction prayed for restraining the respondents from prosecuting suit for rental accruing *antecedently* to the 1st day of July, 1886, is refused. The application for a Receiver is also refused.

new facts are presented which should induce us to change the conclusion formerly reached, to wit, that the injunction should be denied as regards the action brought for rent accruing prior to the first of July, 1886, *when the complainants gave notice of their election to determine the lease and contract of 1870.*

"The ground of relief set up in the bill is that when, at the expiration of the contract with the Pennsylvania Railroad Company, in January, 1885, the complainants contemplated giving notice of their election to terminate the lease, in view of the reduction of net revenues below the amount of rent reserved, the defendants, through their agents, induced and persuaded the complainants to adopt the other alternative of paying them an equitable sum or share of the net revenues that might be realized and as should be agreed upon, and that the complainants consented to this and acted upon that understanding in concluding a new contract with the Pennsylvania Railroad Company. The complainants contend that after this arrangement had been gone into it was inequitable and unjust for the defendants to claim and sue for the original rent. This ground was insisted upon on the former motion; but it is contended that since then the facts have been more fully elicited by the proofs, and that it has been shown that the complainants actually gave notice to terminate the lease, but were induced to withdraw it and to proceed upon the other alternative. Though this is not the way in which the case is presented in the bill, we do not see that it makes any material difference in the case as far as the application for an injunction is concerned. If the facts contended for are a good ground for relief at all, they are as available as a defense at law as in equity. They are set up for *the purpose* of showing that the *condition subsequent* created by the eighth article of the lease, the purpose of which was to cause the covenant to pay \$264,000 per annum to cease, *has been accomplished.* Proof that that condition has been accomplished would be a legal defense to the action."

Nothing here indicates any understanding but that the whole proceeding was founded upon the lease and upon the authority of the provisions it contained. With all due deference, we submit that this opinion of Mr. Justice BRADLEY shows what the grounds were upon which the injunctions were asked, and what the questions were which the Court on that application considered could be interposed as well in the trials at law. The question of *validity* appears not to have been one of them.

When afterwards the lease was by this Court held to be unlawful and void, that judgment clearly disposed of all that part of the bill of complaint which founded its prayer for relief upon provisions of the lease itself. And as to the residue of the bill, even if it were conceded to have been all that is now claimed concerning it, viz., a bill to procure the lease to be declared void for illegality, and for restoration of property received and an accounting for business done under it, it is equally clear that under decisions of this Court such a bill has no place in a court of equity (*St. Louis, Vandalia, &c., R. R. Co. vs. Terre Haute R. R. Co.*, 145 U. S., 393). Such a bill should be dismissed upon demurrer for want of equity. It is obvious that the subject matter and purpose of the bill were entirely disposed of and eliminated when the lease was adjudged void, and that the bill no longer presented any equitable element whatever. Nothing could be done under it, and nothing remained but to dismiss it.

Accordingly the complainant in April, 1891, moved to dismiss the original bill at its own cost. But this permission was *refused* by the Court below and that Court retained the bill *abandoned by the complainant*, for the sole and declared purpose of furnishing to the defendant jurisdiction for a cross-bill, which it was given leave to file (see opinion of BUTLER, J., *Rec.*, p. 552; 49 Fed. Rep., 261).

The Cross-Bill.

The motion for leave to file the cross-bill (Rec., p. 552), stated that in it the defendants would "avail themselves of the tenders of relief made by complainants in their bill." The cross bill itself averred that under the lease all the property therein described was delivered to the complainant; that it was delivered and received in pursuance of the lease, and for its specified purposes; that since the filing of the bill and answer the Supreme Court of the United States had held the lease "invalid by reason " of the same having been *ultra vires*, and for other " reasons " (Rec., p. 556); and that said agreement was therefore null and void. It averred that it was the duty of the cross-defendant to return the said property, including *inter alia*, the patent rights, the 119 cars, together with their bedding and equipment, the contracts which had been assigned to it and all new contracts and renewals thereof entered into with any of the railroad companies with whom the cross-complainant had contracts at the time of making said agreement. The cross-bill then proceeded as follows:

"If it be not within the power of the said car company to make such delivery, then, as your orator is advised and therefore avers, it is its duty to deliver an equivalent therefor, and to account for the profits which it has derived under and by reason of the property delivered to it under said agreement.

"It is further the duty of said car company, as your orator is advised and therefore avers, to fully account for all profits which it derived from the use of said property.

"10. Your orator is advised and therefore avers that the said car company now holds all contracts for transportation made by it with railroad companies with whom there were transportation contracts with your orator at the time of said agreement of the 17th of February, 1870, IN TRUST for your orator, with

a duty to *account for the profits* derived therefrom.

"Being without an adequate remedy at law, your orator prays equitable relief as follows:

"(a.) An account by the said car company of all the profits which it has derived *since the making of said agreement of the 17th of February, 1870, by the use of the property*, transferred to it under said agreement by your orator.

"(b.) A decree that the amount found due by said accountant for said use of said property shall be paid over to your orator.

"(c.) A decree that the said car company is the TRUSTEE for your orator for all contracts for transportation, whether original, new or renewals, held by it with railroad companies with which there were contracts for transportation with your orator *at the time of making said agreement of the 17th of February, 1870.*

"(d.) A decree ordering the said car company to pay to your orator all such sums as shall be due it by said company *as such trustee*, and that it shall, in the *future*, from time to time, account for the sums which shall be due by reason of future operations under said contracts.

"(e.) Discovery and an account by the said car company of its use and disposition of the property turned over to it by your orator, and a delivery by said car company to your orator of all such property in proper order and condition, or if this cannot be done, a decree that the value thereof shall be paid to your orator, and that all sums derived from said property shall be paid over.

"(f.) General relief."

To this cross-bill three demurrers were filed (Rec., pp. 558-561).

The *first* is a general demurrer, asserting that the cross-bill was filed contrary to the practice of the Court and under circumstances in which a cross-bill is not allowed; and also that it appeared that under it the Court had no jurisdiction. Unless technically

supported as a cross-bill, it would stand as an original bill, and under an original bill the Courts of the United States would have no jurisdiction of the parties.

The *second* demurrer related to that portion of the cross-bill which prayed a decree that the cross-defendant was *a trustee* of all the above mentioned contracts for transportation, whether original, new or renewals; and for a further decree for the payment of such sums as should be due from it *as such trustee*, and that it should, in the *future*, from *time to time* account *as such trustee*.

The *third* demurrer related to that part of the cross-bill praying an accounting of all the profits derived *since the making of the lease* of February, 1870, *by the use* of the property transferred under said lease.

All these demurrers were overruled by the Court, with leave, however, to present the questions again on final hearing.

The Answer.

The answer of the Pullman Company, the cross-defendant, admitted the delivery to it of the property mentioned in said lease and its schedules, but averred that all the said property was delivered and received in pursuance of said lease, and *to be used in promoting the purposes* of said lease, and not otherwise. It averred that said sleeping cars were taken only incidentally and as a part of a *primary purpose* of the contract to transfer to the Pullman Company all the assets and the entire business of the Central Transportation Company; that its purpose and inception was in the wish of the Pennsylvania Railroad Company to substitute upon its lines the Pullman service: *first*, because of the connections of that service over the principal Southern and Western roads and to the Pacific Coast; and, *secondly*, because the cars and service of the Transportation Company were un-

satisfactory to the traveling public and the Pennsylvania Railroad Company, and that company had been informed by agents of the Union and Central Pacific roads that the Transportation Company's cars were diverting travel from the Pennsylvania system to competing lines using Pullman cars.*

It showed that all of said railway contracts had expired by lapse of time or otherwise; that none of them reserved any right of renewal to the Central Company, and that all the patent rights had expired. It furnished statements of the use, value and disposition of the railway cars, and the extent to which they had been used up in the conduct of the business; averred that during that time it had paid, as compensation, to the cross complainant the sum of \$3,960,000; that it was at all times the duty of the cross-complainant, said lease being illegal and void, to resume possession of its property and business, or so much of it as continued in existence, and particularly to have accepted the same when offered to be restored in June, 1886; that from that date no obstacle had been placed in the way of its possession, and that it should be deemed to have been in the control and possession thereof; that it had asked the Court to take possession of said property by a receiver, but that said cross-complainant making objection thereto, the Court had refused to do so. It admitted that in the month of June, 1886, it gave notice of an election to determine said lease, and thereupon made to the cross-complainant the tender set forth in "Exhibit F" to the original bill. It averred that said tender was made in good faith, but was refused by said cross complainant; and that *since said refusal, and before the filing of this cross-bill*, it, the complainant in the original bill in which this tender was set forth, abandoned its said bill of complaint and moved for leave to dismiss the same. It submitted that the rule which precludes the grant-

* A portion of the testimony upon this subject is shown in the note on page 88 *post*.

ing by any court of equity or of law of affirmative relief upon a contract for violation of public policy, forbade the Circuit Court to allow such affirmative relief upon this cross-bill, and that the order of the Court refusing the motion of the original complainant to dismiss its bill, and the order granting leave to file the cross-bill, did give the aid of that Court to one party and against the other under a contract which the Court itself had held obnoxious to public policy and totally void between the parties. The cross-defendant denied that it owed any duty to the cross-complainant, or that it held any transportation contracts or other property *in trust* therefor, with any duty to account for profits derived thereunder. It averred further that the alleged title of the cross-complainant, as presented by said cross-bill, to the property therein mentioned was a *strictly legal title* and was the proper subject matter of an action at law if any right of action at all existed therefor, and that any claim to profits or earnings as asserted by said cross-bill, if it existed, was merely an incident to said legal title and equally the subject matter of an action at law. It insisted that if any such right as that asserted by the cross-bill existed in said cross-complainant, the remedy therefor was at law, and the *answer expressly asserted* the claim that, under the *Constitution of the United States*, and the acts of Congress, the court of equity had no jurisdiction thereof; and the answer also set forth the Statute of Limitations of the State of Pennsylvania.

Testimony having been taken, the cause came on for final hearing, and on December 18, 1894, the Court, by BUTLER, J., filed its opinion shown in the Record at pages 745 and 1126, whereby it held that the cross defendant must account to the cross complainant for the value of the property delivered under the lease "*when received, together with its earnings since, less the amount paid as rent.*" The Court at the same time referred the cause to a Master, for the purpose of ascertaining these

amounts, and the report of the Master is shown in the Record, pages 1133 to 1183.

The Master's Report.

The Master appraised the value in January, 1870, of the property claimed to have been then transferred under the lease, at \$2,552,000, taken to be the *aggregate market value at that time of all the shares of the capital stock of the Central Company.*

On the hearing before the Master the Pullman Company reported *all earnings made by operation of the lines embraced in the Central Company's contract during the time of duration of those contracts, whether made by its own cars or by the Central Company's cars, and all earnings made by the latter cars, anywhere and at any time* (Rec., p. 866). In doing so *it conformed fully, as it claimed and believed, to the order of the Court.*

There was difference of view as to the scope of the order of reference, and the Pullman Company objected to *reporting business not embraced as it was advised in the order of the Court; but it declared its readiness to conform to any order on the subject which the Court might make, and did in fact answer every call made by the Master at the hearing.*

It would have been a simple, and we think usual procedure, for the Master to report the case to the Court for instructions, or for the counsel of cross-complainant to apply to the Court for explanation or enlargement of the order; but no such report or application was made.

Certain of the Central Company's contracts with railways were expressed to run "*during the continuance of the incorporation*" (Rec., p. 1144) of that company. That company was, *when these contracts were made*, incorporated under a general law of Pennsylvania for twenty years, expiring December 30, 1882 (Rec., p. 1135). In 1870 a special act of the Legislature of Pennsylvania extended the duration of that charter for ninety nine years (Rec., p.

532), and added to the franchises and to the scope of the business of the company; and it was claimed by the cross-complainant that *this act operated to extend correspondingly the duration of such contracts*, all of which had been made long before with the various railway companies.

It was insisted by the Pullman Company that, under the provision of the Constitution of the United States which prohibits the impairment of the obligation of contracts by State legislation, this act of the Legislature could not thus modify or extend *an existing contract*, and that such contracts expired with the period of corporate life of the Central Transportation Company as fixed by its charter at the time they were made.

The Master reported to the Court that "an accurate ascertainment of the earnings without further evidence than that which had been produced before him was impossible" (Rec., p. 1177). The Pullman Company insisted that a just statement of earnings had been made conforming to the order of the Court, and that upon such statement it appeared that the *amount paid as rental had exceeded the earnings* during the fifteen years from 1870 to 1885 by more than \$1,660,000, leaving that amount to be credited in 1885, under the order of the Court, upon the valuation of the Central Transportation Company property made by the Master. The Master, nevertheless, while stating that this table presented a nearer approach to a solution of the question than any of the tables above alluded to, considered that it should be subject to certain corrections, and said (Rec., p. 1182):

"If the corrections suggested by the Master should be deemed proper, additional testimony is requisite. *It would be idle to speculate upon the result of such testimony when adduced. Until further testimony is presented the Master cannot ascertain and report whether or not the amount received as earnings during the pendency of the lease ex-*

ceed or are less than the amount paid as rental.

“Counsel for the Central Transportation Company have contended that the earnings largely exceeded the rental, and whilst not abandoning their claim as to such excess, have stated their willingness to waive it rather than to be subjected to the delay incident to the production of additional proof. The Master has, however, *been unable to accept their estimate of earnings* for reasons heretofore stated. They have also called his attention to various errors in the calculations submitted by the Pullman Company. *They have not, however, at any time, made a call on the Pullman Company for the production of its books.* The Pullman Company has failed, though requested by the Master, to furnish him with such information as would, he believes, have enabled him to state an account. In so doing *it has doubtless conformed to what its counsel has advised as the true interpretation of the order of reference,* but the testimony furnished has not been sufficient to make it possible for the Master to comply with the directions of the Court as they are understood by him, and he *accordingly* is compelled to report that he has not as yet been furnished with sufficient data to *enable him to ascertain the difference* between the rentals paid to the Central Transportation Company from January 1, 1870, to January 1, 1885, and the receipts derived by the Pullman Company from its use of the property transferred during the period above referred to.”

It further appears from the Master's report (Rec., p. 1180) that a claim for very large earnings of the Pullman Company, chiefly “earned by Pullman cars and by the use of Pullman capital,” was made by the counsel for the cross complainant. While professedly deduced from the statements and accounts furnished by the Pullman Company, the conclusion that they belonged to the cross-complainant was entirely disapproved by the Master, and in dis-

cussing that claim the Master said (Rec., pp. 1180-81):

"This measure of value does not appear to be sound. The analytical statements not only *refer to another territory*, but the large profits shown therein by the counsel for the Central Transportation Company *are mainly due* to the fact that the operation of sleeping cars *over such territory* was an enormously profitable business, and out of the profits thus derived the Pullman Company's share is restricted to six per cent. for interest and six per cent. for depreciation, and *the residue of the profit is credited* to the Central Transportation Company, *notwithstanding the fact that the greater portion of it was earned by Pullman cars and by the use of Pullman capital.*

"The Central Transportation Company's claim is also in part made up of earnings derived from the Central division *after the assigned contracts had expired.* These earnings, it is said, the Central Transportation Company is entitled to **BECAUSE** the value of the Pennsylvania Railroad Company's contract, which ran for *fifteen years*, was presumably *the value of the contracts with that system* which the Central Transportation Company contemporaneously *assigned* to the Pullman Company.

"In this connection it must be remembered that what the Central Transportation Company parted with was not only its contract with the Pennsylvania Railroad Company and its leased lines, but certain other contracts as well, and also all of its other property, and *that what the Pennsylvania Railroad desired to receive* from the Pullman Company at the time in question was *not only Pullman cars and service, but Pullman Company's connections as well.*

"For the reasons above stated, the Pennsylvania Railroad Company was willing and desirous to make a contract with the Pullman Company in 1870, and in order that this should be effected it was necessary that there should be an understanding reached as to its outstanding contracts with the Central Trans-

portation Company. But it does not follow that the substituted contract and the assigned contract were equal in value. Without the assignment the substituted contract could not have been made. It was an element in the conduct of the negotiations; *but it was not property received by the Pullman Company from the Central Transportation Company*, and it is only as to such property that the inquiry as to earnings, as understood by the Master, is directed."

On the coming in of the report exceptions were filed by the cross-defendant, which were argued and are shown in the Record at pages 1185 and 1188. All were dismissed, however.

Certain exceptions were also filed by the counsel for the cross-complainant (Rec., p. 1187), and these were also *nominally* dismissed; but the suggestions they contained were at once adopted by the Court and embodied in its opinion and judgment, which are shown at page 1194 of the Record.

There the Court declared that *the burden was on the cross-defendant to show the earnings and that they were less than the rental*; that the Pullman Company was in default for not furnishing evidence *not called for by the order of the Court*, and that *all intendments were accordingly adverse to it*, and it *would therefore be assumed* that the earnings were at least equal to the rent, *or the Pullman Company would have shown the contrary*. Then appeared for the first time the declaration of the Court that the Pullman Company was *not liable* for the value of the property in 1870, when it was received, *as had been held* in the order of reference directing the Master to find the value at that date, *but for the value in 1885*, when, it held, the lease was disaffirmed; and that the inquiry *had been directed* to the value in 1870 *for the purpose of ascertaining thereby* the value in 1885.

No further inquiry as to earnings was directed, nor any elucidation given of the order to the Master,

and no inquiry was ever directed as to the value of the so-called "property" in 1885, nor any opportunity given to show its condition or its value at that date, or the aggregate market value then of the total number of shares of the capital stock.

The radical difference between the theory and principles of the judgment of the Court announced in December, 1894, after the final hearing and upon the reference to the Master, and those to which the Court changed on January 13, 1896, after the Master's report, are shown by comparison of the opinions:

Opinion and Order of Reference to Master December 18, 1894 (Record, p. 1132).

"The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff and cannot be separated. Compensation must therefore be made. What, then, is the measure of compensation? *Clearly, we think the value of the property when received, together with its earnings since, less the amount paid as rent.* In ascertaining the value the annual rental may be considered, but it does not afford a conclusive nor entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising

Opinion and Order of January 13, 1896, upon Master's Report (Record, p. 1195).

"We think the inference that the earnings were equal to the rent paid is reasonable, if not unavoidable. *If they were not, the Pullman Company, having possession of the evidence, should have shown it.* The testimony produced by the transportation company was quite sufficient to put the burden on the other side. The failure to respond to the Master's request greatly strengthens the inference. It is urged, however, that if the Pullman Company is charged with the property as of 1870, it must be treated thereafter as entitled to the earnings and be credited with the amount subsequently paid as rent. Of course if it is treated as

its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business, and its earnings *at the time when they passed into plaintiff's hands* and subsequently. It is not their value to the plaintiff we want, but to the defendant; in effect, *what it lost by parting with them*. The value of both property and earnings may have been worth more to the plaintiff with the business united, but this cannot be considered.

"For the purpose of ascertaining these values the Court refers the subject to Theodore M. Etting, Esq., as Master, with direction to report within sixty days (from the testimony taken and such further as may be produced).

From Master's Report (Record, p. 1171).

"XII. Passing to the consideration of the main question raised in the present reference, viz., what the Central Transportation Company lost by the transfer of its property to the Pullman Company, the measure of damages as determined by the Court re-

owner from that date, it could not justly be held accountable for earnings thereafter and would be liable only for the value, with interest from that date, subject to the credit stated. But it is not so treated, and cannot be, because it would not correspond with the facts and would be unjust. The *ownership* of the property remained in the transportation company, the Pullman Company taking possession and *holding it for the former*, paying a stipulated price for its use up to 1885. The lease under which the parties acted was void, but this did not render the acts void. They chose to and did treat it as valid, and to the extent that its provisions were executed the Court will not interfere, except to prevent manifest injustice. Up to 1885 they were executed; the Pullman Company got and enjoyed the use and paid the stipulated price. Inasmuch, however, as the enjoyment of the use was granted and the rent was paid therefor in contemplation of a longer continuance of the arrangement, it was supposed that the rent might fall short of a just compensation for the use or be in excess of such compensation. This was, therefore,

quires the Master to ascertain:

"(1.) What was the value to the Central Transportation Company in 1870 of the property transferred?

"(2.) What was earned by the Pullman Company between January 1st, 1870, and January 1st, 1885, from the use of the property transferred?

"(3.) The difference between the amount so received by the Pullman Company and the rental paid by it to the Central Transportation Company for the above period.

"(4.) The total amount to be paid to the Pullman Company, as of January 1st, 1885, deduced as above, together with interest thereon from January 1st, 1885, to date of final decree.

* * * *

"The order of reference as *understood by the Master* limits his authority to the ascertainment of the extent or amount of the property received and its *value when received*, together with its earnings since, less the amount paid as rent. General directions as to the course to be pursued by the Master in arriving at the above valuation were stated by the Court in its opinion. Whether in connection with this valuation there is to be a separate ap-

considered a proper subject of inquiry. It is plain, however, that *the parties substantially intended that the use and the rent should balance each other*, and in the absence of proof to the contrary *it should be presumed* they did. It was not, therefore, until 1885, when the Pullman Company ceased to pay rent and *repudiated the arrangement* that it became practically responsible for a return of the property or *the payment of its value*. Of course it may be said that such responsibility actually existed from the beginning, because the arrangement was unlawful. The parties, however, did not so understand and treated it as lawful, and to the extent of what they thus did in good faith their acts will not be disturbed. *It is too late now to treat the responsibility as existing in 1870 and make settlement accordingly.* It would not only be in conflict with the facts, but would work manifest and very great injustice. It would enable the Pullman Company to set up the statute of limitations, as it did before the Master, and if this failed, then to take the property for less than it agreed to pay and did pay (interest considered) substantially as compensa-

praisal of each form of property transferred or the appraisal of the plant as a going concern, is a question which is left open, and which, therefore, in the first instance, must be decided by the Master."

tion for fifteen years of its use. It is *the value of the property at the time it should have been returned* that the Pullman Company should be charged with. *Inasmuch* as this value would be difficult of ascertainment by the transportation company except by reference to the value in 1870, IT WAS CONSIDERED *proper to direct the inquiry to the latter date*. Presumably the value increased; the evidence fully justifies the presumption. *If it decreased*, the Pullman Company could and *should have shown it*. *The Master's valuation in 1870 is, therefore, to be taken as the value in 1885, when the property should have been returned*. The payment of this sum, with interest from January 1st, 1885, seems necessary to a just settlement, *treating the value of the use and the rents paid prior to that date as balancing each other*. A decree may be prepared accordingly, dismissing the exceptions and *confirming the report*."

It was not clear by what authority the Court fixed upon January, 1885, as the date when the capital value of the "property" should be ascertained and interest thereon should commence. But in its opinion of January 13, 1896, it stated the ground upon which it proceeded as follows:

"It was not, therefore, until 1885, when the Pullman Company *ceased to pay rent and repudiated* the arrangement that it became *practically responsible for a return of the property or the payment of its value.* * * * It is the value of the property *at the time it should have been returned* that the Pullman Company should be charged with. * * * The Master's valuation in 1870 is, therefore, to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement. * * *"

But here is a singular error of fact. If anything is shown in this record it is that the lease was *not* repudiated, and payment of rental under it refused in January, 1885. If rent actually ceased then to be paid, it was solely because the Pullman Company contended that the rental *had been modified* under the provisions of that section "EIGHTH" of the lease which was considered and construed by this Court in the case reported in 139 U. S., page 62. The Pullman Company contended that the reduced amount had become, under the lease itself, *the contract rental to be paid.* The lease was not repudiated until the plea of *ultra vires*, &c., was filed in the case reported in 139 U. S., p. 25, and that suit was not begun until September 21st, 1886, and the plea was filed long afterward. This original bill, which supported the lease, was filed January 25th, 1887. The record shows that the lease was *not* repudiated and payment of rent stopped for that reason on January 1st, 1885. On the contrary, the records in this Court show that for *about two years after that date, the parties were acting under the lease*; the only controversy being as to the *amount* of the rental.

However, by this process the \$3,960,000 paid by the Pullman Company was expunged. This sum under any degree of conformity to the rulings of the Supreme Court and to the opinion and directions of the Court below to the Master, and to the conclu-

sions of the Master must have greatly *exceeded* the *earnings from the use of* Central Transportation Company's *property*; and the value of the so-called "property" was arbitrarily assumed *to have increased* during that period of fifteen years, during which the patents and railway contracts of which it chiefly consisted all expired and ceased to exist, and the tangible property, such as the original cars, had been largely used up and consumed in the ordinary operation of the service.

But by this new shuffling of the facts and elements of the case these expired patents and contracts and worn-out cars are made to reappear in the capital valuation with which we are charged, as though they were unimpaired in their original integrity, and the \$3,960,000 paid to the cross-complainant, to disappear entirely from the reckoning. But the astonishing disclosure embraced in the following language, namely:

"It is the value of the property at the time it should have been returned that the Pullman Company should be charged with. *Inasmuch as* this value would be difficult of ascertainment by the Transportation Company *except by reference* to the value in 1870, *it was considered proper to direct the inquiry to the latter date.*"

is altogether insufficient to cover the absolute change in the position and attitude of the Court or obscure the inconsistency between the opinion and order of December 18, 1894, and that of January 13, 1896.

The so-called "plant" or "business" of the Transportation Company was founded *not* on substantial and permanent property like a manufacturing establishment or a railway road-bed and its equivalent, but merely on certain patent rights and sleeping car contracts with railway companies. The contracts, sixteen in number, were chiefly with the Baltimore and Ohio and Pennsylvania systems of railways. They were all of moderate duration and

were *without any right of renewal*. In fact, the operation of the service on the Baltimore and Ohio system and on the Ohio and Mississippi lines had passed out altogether by Noxember 1, 1880 (Rec., p. 459), and when in January, 1885, the Pennsylvania contract, then existing with the Pullman Company, expired and renewal was refused, substantially the last contract *claimed* to be comprised in this "plant" was gone.

The physical and tangible property consisted of a number of sleeping cars and their equipment, most of them old and worn out, and all of them of antiquated and obsolete pattern and construction, which the railways were condemning and forcing off their lines. The patents were of no value or use except to protect the use of the old cars already built under them; no others were ever constructed under them. The "business" in 1870 was such as depended on these contracts and the use of these cars.

The Court by its order of December 18th, 1894, held that the Pullman Company "took possession" under the lease "of the property and business transferred;" that the Master should ascertain what value the Transportation Company "lost by parting with them," and that the Pullman Company must account for the value of the property *when received* together with its earnings since, less the payments made as rent. For this value the master assumed to take the market value of the total stock in 1870. Subsequently the Court, in January, 1896, held that the liability was *not* for value of property *when received* but for its value when on *repudiation of the lease* it should have been returned, for which date it fixed January 1st, 1885.

Decree was rendered on the cross-bill for the estimated value of the so-called "*plant*" or "*property*"—irrespective of any details—of the Central Transportation Company in 1870, assumed arbitrarily and without inquiry or evidence to be its value also in 1885, and for interest thereon from that

date, with an appropriation in satisfaction of previous earnings of the payments of rent, which amounted without interest to nearly \$4,000,000. From that decree on the cross-bill this appeal is taken.

The assignments of error are of three classes: *First*, those by which are denied the right of the cross complainant to relief in this proceeding or in the court of equity; *second*, those by which are denied the right to affirmative relief in any court of law or equity because of the character of the contract of lease which was held void by this court; and *third*, those which upon other grounds draw in question the correctness of the existing decree.

SPECIFICATION OF ERRORS.

FIRST.

The Court erred in refusing to dismiss the original bill on motion of the complainant. Page 33 post.

This includes the assignments of error numbers 1 and 2.

SECOND.

The Court erred in allowing the cross-bill to be filed in the cause. Page 40 post.

This includes the assignments of error numbers 3 and 4.

THIRD.

The Court erred in not holding that the subject-matter of said cross-bill was the proper subject-matter of action at law and of trial at law and by jury only, both under the provisions of the seventh amendment of the Constitution of the United States and of Section 723 of the Revised Statutes of the United States. Page 44 post.

This includes the assignments of error numbers 7 and 8.

FOURTH.

The Court erred in not sustaining the three several demurrers to the cross-bill. Page 53 post.

This is the fifth assignment of error.

FIFTH.

The Court erred in holding the cross-complainant entitled, under the circumstances stated in the cross-bill, to any affirmative intervention of the Court on its behalf relating to property transferred for the purposes of the illegal lease, or to earnings made by the use thereof. Page 55 post.

This includes the tenth and twenty-seventh assignments of error.

SIXTH.

The Court erred in its determination of what constituted "the property" transferred under the lease of 1870 for which it held compensation must be made; and the value of the total capital stock estimated by market price of certain share was no proper measure of the value of such property. Page 81 post.

This involves consideration of the assignments of error Nos. 16 and 17, together with Nos. 11, 12, 13, 14, 26, 27 and 28.

SEVENTH.

It was error in the Court below to hold that the cross-complainant was entitled, under any circumstances or conditions, to recover earnings, and in not holding that the obligation, if any, of the cross-defendant was limited to interest instead of earnings during the period preceding the disaffirmance of the lease. Page 117 post.

This involves the subject-matter of the assignments of error Nos. 5, 18 and 22.

EIGHTH.

The Court erred in this: that, while holding that it would treat the void lease as executed by the acts done by the parties "up to 1885," when it alleged the lease was disaffirmed, and that "to the extent its provisions were executed the Court would not interfere," it confined the rule to the mere receipt of earnings and to the payment of rental, and did not hold that other provisions of the lease were equally executed, and were not to be disturbed, namely, the act of transfer and delivery of property under the lease, and the expiration and extinction of railway contracts and patents so that they had no value in 1885. Page 129 post.

This includes the assignment of error No. 27.

NINTH.

In holding the lease executed up to 1885 by the acts of the parties, the Court erred in not holding the rental reserved and paid to have been an agreed and conclusive valuation by the parties, not merely of the USE of all PROPERTY for that period, but ALSO of the unlawful covenant of the lessor not to exercise its franchises; and the Court erred, therefore, in not holding that a part only of the rental paid should represent and offset the earnings under the lease, and that "the chief consideration for the sums paid" was the cross-complainant's covenant to abandon its business, and that the "chief" portion of the sums paid as rental should accordingly be otherwise applied to the credit of the cross-defendant. Page 134 post.

This includes the assignments of error Nos. 19 and 28.

TENTH.

The Court erred, in its decree, by adopting the valuation of property made by the Master as of 1870, based on market value of the total capital stock as the measure of value of the Central Company's property in the hands of the cross-defendant in 1885, without any reference to a Master to make the inquiry, or other opportunity given the cross-defendant to show the actual value of said property or the actual market value of said capital stock in 1885. Page 135 post.

This is the 25th, 26th and 29th assignments of error.

ELEVENTH.

The Court erred in confirming the finding of the Master that certain railway contracts belonging to the Central Company, originally made to continue "during the continuance of the incorporation" of that company, were continued in force and extended for ninety-nine years by force of an act of the Legislature of the State of Pennsylvania of the 9th of February, A. D. 1870, by which said Central Company was given a corporate life for another period from the expiration of its then existing charter; and the Court erred in not upholding the claim of the cross-defendant that such effect of said legislative act was in conflict with and forbidden by Article I., Section 10, of the Constitution of the United States, which prohibits on the part of the States any enactment impairing the obligation of contracts. Page 139 post.

This includes the assignments of error No. 23.

TWELFTH.

The Court erred in holding the cross-defendant to have been derelict in that it had refused or neglected to produce to the Master in evidence all earnings called for by the order of reference ; and in holding that the cross-defendant had failed or refused to disclose earnings called for by the Master under authority of said order of reference ; and in assuming arbitrarily that the burden of proof was upon the cross-defendant to show that the earnings were less than the rental paid ; that the parties to the lease intended that the use and rent should balance each other, and that, in the absence of proof to the contrary, it should be presumed they did. Page 142, post.

This is the substance of the assignments of error Nos. 5, 22 and 24.

The assignments of error are shown at page 1200 of the Record, and the foregoing specifications indicate those to which we wish specially to call the attention of the Court.

First.

The Court erred in refusing to dismiss the original bill on motion of the complainant.

It seems to be established in the law of this Court that it was the *absolute right* of the complainant at the stage when that motion was made, to dismiss the original bill, and that none of the conditions existed under which leave for such dismissal might properly be withheld.

The "general rule" of the "*right*" of the complainant in an original bill, at any time, upon payment of costs, to dismiss his bill, and *the exception*

that may be allowed in this Court to that rule, are stated in *C. & A. R. R. Co. vs. Union Rolling Mill Co.*, 109 U. S., 713. The Court said:

"It may be conceded that when an original bill is dismissed before final hearing a cross-bill filed by a defendant falls with it. It may also be conceded that, *as a general rule*, a complainant in an original bill *has the right at any time*, upon payment of costs, to dismiss his bill. But this latter rule is subject to a *distinct and well settled* exception, namely, that *after a decree*, whether final or interlocutory, has been made, *by which the rights of a party defendant have been adjudicated*, or such *proceedings have been taken as entitle the defendant to a decree*, the complainant will not be allowed to dismiss his bill without the consent of the defendant."

It is the general rule, therefore, that the complainant *has the right at any time* to dismiss his bill, and the *exception* to the rule is "*distinct and well settled*," and it is made perfectly unambiguous in the language of this Court. Under that clear statement this case furnishes none of the conditions which make exception to the rule, and under which the Court may lawfully retain a bill against the will of the complainant; on the contrary, it presents a situation where the rule establishes the right to dismiss as "well nigh absolute" (*Am., & Co. vs. Celluloid Mfg. Co.*, 32 Fed. Rep., 809).

In the exercise of actual power a judge may wrongfully refuse dismissal of a bill and hold in court a reluctant complainant, who wishes to abandon his suit because the situation has changed and his purpose has ceased to exist. Such action has been made effective here; but the question is of some gravity whether the conditions under which the exercise of such force is permitted were regarded; and whether the regulations imposed by the authority of this Court and the established procedure of the Court of Chancery were observed.

The inaccuracy of the Court below in its statement of (49 Fed. Rep., 262; Rec., p. 553) the rule by which it should have been governed when refusing leave for dismissal of this bill seems certain. The Court said:

"The propriety of allowing discontinuances in equity *depends upon whether defendants may be prejudiced thereby*. A decree or decretal order entered is usually a conclusive answer to the application. Here *not only was such an order entered*, but it now appears that the proceeding, or a similar independent one commenced by himself, is the defendant's only means of enforcing his rights. * * *"

It is *not* the mere fact that a defendant *may be prejudiced*, or that "a decree or decretal order" of *some sort* has been entered in the cause which "is usually a conclusive answer to the application" to dismiss voluntarily, nor does it seem ever to have been so held elsewhere. The *kind of* prejudice involved, and the *kind of* decree, final or interlocutory which between the complainant and defendant make *the exception* to the rule are specified *plainly enough* in the above statement of this Court, and are put beyond the range of mistake in the authorities which it cites in the above case of *C. & A. R. R. Co. vs. Union, &c., Mill Co.*, 109 U. S., 713.

Thus, in *Cooper vs. Lewis*, 2 Ph. Ch., 181, the Lord Chancellor said:

"The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position as he would have stood if the suit had not been instituted; it is not so where there has *been a proceeding* in the cause *which has given the defendant a right against the plaintiff*."

In *Bank vs. Rose*, 1 Rich Eq. (S. C.), 294, it was said:

"But whenever, *in the progress of a cause*, the defendant *entitles himself to a decree*,

either against a complainant or a co-defendant, and the dismissal would put him to the expense and trouble of bringing a new suit or making new proofs, such dismissal will not be permitted."

This statement in *Bank vs. Rose* is cited and approved in 55 Fed. Rep., 572. The defendant must *first* in the progress of the cause *have entitled himself to a decree for the establishment of some right*.

In *Watt vs. Crawford*, 11 Paige, 472, the Chancellor said:

"Before any decree or decretal order has been made in a suit in chancery, *by which a defendant therein has acquired rights*, the complainant is at liberty to dismiss his bill upon payment of costs; but *after a decree has been made by which a defendant has acquired rights*, either as against a complainant or against a co-defendant in the suit, the complainant's bill cannot be dismissed without destroying those rights."

In *Connor vs. Drake*, 1 Ohio St., 170, the Court said:

"After a defendant has been put to trouble in making his defense, if *in the progress of the case rights have been manifested that he is entitled to claim*, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill."

In this case of *Connor vs. Drake*, there had been a *decree for specific performance of a contract* on a bill filed for that purpose, and a *subsequent award of appraisers or arbitrators in execution of the decree*. The defendant claimed and insisted upon the *benefit of that decree and of that award* which the complainant sought to avoid by dismissing his bill.

The foregoing are the *illustrations* by which this

Court defines the exception which it allows to the otherwise uniform rule. The decree, order or proceeding which justifies the exception must be one occurring in the progress of the case by which some substantial right has been established to the advantage of the defendant, the benefit of which he would lose if the bill were dismissed. All these illustrations, used by this Court, come within the limits of the rule and of the exception stated by it. In the principal case (C. & A. R. R. vs. Rolling Mill Co., supra), several defendants had independent rights in the subject matter of the controversy, and one defendant having, by answer set up his particular right, had also filed a cross-bill to enforce it. The cases proceeded and were heard together, and an interlocutory decree entered to enforce the right thus set up. The interlocutory decree had been entered establishing the lien of the Rolling Mill Company as claimed in its answer and its cross-bill. The motion to dismiss the original bill came "after this proceeding, and when the controversy between the parties had practically ended by the interlocutory decree of the Court" (p. 716). It appeared that if the original bill, carrying with it the cross-bill, had been then, after that decree dismissed, the claim of the Rolling Mill Company would be barred by the Statute of Limitations and it would lose the benefit of the decree it had already obtained; for the Rolling Mill Company had already obtained a decree and thereby established that claim "by a proceeding in the progress of the case," and under a cross-bill which had long before been properly filed.

Carrington vs. Holly, 1 Dickens, 281.

R. R. Co. vs. Hendee, 27 Fed. Rep., 678.

Glasscock vs. Brandon, 12 S. E. Rep., 1102.

Now, *what* "decree or decretal order" had according to the statement of the Court below been ever entered which brought *this* case within the allowed

exception to the rule? What *right* against the complainant had the defendant established or *entitled itself to a decree for* in the progress of this original cause?

There had been no hearing nor any order for hearing of the cause, *nor was it ready* for hearing. No testimony had been taken by the defendant. No decree, "final or interlocutory," had been made which had *adjudicated any right of the defendant*, nor had any *proceedings* been had which *entitled it to a decree* for anything. Nor had any attempt been made to file a cross bill or to claim affirmative relief in any form.

The only "decree or decretal order" ever made in the cause was the interlocutory order by which the defendant *was enjoined from suing* on the lease. No right of the defendant to any *affirmative* relief was "manifested" or established by that order; and in *Day vs. Snee*, 3 Ves. & B., 170, it was held by Lord ELDON that a preliminary injunction was *not in the nature of* a decretal order.

In fact, the only order ever made in the original cause, namely, the one enjoining the defendant from bringing suits for rental accruing after July, 1886, was one which assumed, necessarily, *the validity of the lease*, for it was *in aid of its provisions*, and to that extent assuredly established no right of the defendant presented by this cross-bill.

One thing is *certain* under the *decisions of this Court*: There *is a period of time during which* a complainant *has the right* to dismiss the bill. Now, what had ever occurred to put a bar in this case to that right?

The tenders of the original bill.

The motion for the defendant was "for leave to file a cross-bill, in which they will avail themselves of the tenders of relief made by complainants in their bill."

It has been pretended in some misty way by the

cross-complainant that this cross bill could be made available for holding the complainant in the original bill to the terms of the offers therein contained for the surrender of property transferred in pursuance of the lease, and to the offers of compensation therein contained for such property as no longer existed or for other reasons could not be restored; and this suggestion also seems to have been noticed by the Court below. But no one ever acted on it, and it would be a most anomalous and unprecedented thing if this could possibly be true. Those were offers based on obligations created *by the covenants of the lease*, and were offers of *performance* of those covenants. It was *after* the original bill had been filed that the lease was adjudged in another cause to be void, and that judgment, with its necessary legal consequences, had *supervened* upon these offers or tenders such as they were.

Moreover, these propositions of the original bill had been *expressly rejected* by the *answer* of the defendant filed to that bill.

After such a rejection, once declared, *the election* to that effect by the defendant *could not be recalled* and the propositions subsequently accepted without a new proffer or a new consent on the part of the complainant.

Furthermore, the complainant filed its motion to dismiss its bill *before any suggestion was made* by the defendant of any purpose or willingness to accept the offers of the bill, and *before* any application for leave to file a cross-bill, or the assertion of any claim whatever to affirmative relief or notice of any such purpose on the part of the defendant. Whatever might be the right of the complainant to dismiss its bill without leave of Court, it *had the right to withdraw a tender* or anything in the nature of a tender *before it had been accepted* and before any order had been made confirming any right of the defendant thereto, and especially while all the offers of the bill *stood expressly refused*. When leave to file cross-bill was asked, the complainant

had already moved to dismiss its bill, and all its proffers stood abandoned and withdrawn.

Nor did the cross-bill itself attempt to accept them. On the contrary, the cross-bill itself again rejected them and insisted on a different and exaggerated demand. Offers of that character *must be accepted as they are made*, or they are rejected. The wildest extravagance will not pretend that any phrases of the original bill contemplated or intended an offer of what is asked for by the cross-bill.

Second.

The Court erred in allowing the cross-bill to be filed in the cause.

(1.) It seems very obvious that *the original bill furnished* at that stage of the cause *no possible foundation* for a cross-bill. It contained no subject-matter out of which a cross-bill could grow. The original bill set up the election of the complainant to terminate the lease in execution of provisions which the lease itself contained. Its only *equitable* element was its appeal to the court of equity for aid of that court in making a substantial performance of the covenants of that lease relating to the restoration of the demised property in such case of termination. The application was based upon the impossibility of performing those covenants literally according to their terms.

When, under the judgment of this Court, the lease itself was afterward held to be not merely voidable but utterly void in all its provisions, it is obvious that the whole subject-matter of the bill, above stated, was thereby extinguished, and no foundation for equitable relief to the complainant any longer remained. When the Supreme Court had adjudged the lease, to enforce which the

original bill was filed, to be thus void, it put an end to that part of the cause.

Now, if we assume what is claimed by counsel and in the opinion of the Court below, that one purpose of the bill was to *set aside the lease for illegality*, then the judgment of this Court left *only that part of the bill in force*. This is that part to which, for the sake of this cross-bill, such sudden prominence was given.

But it is perfectly clear that a bill in equity filed for such purpose could not be entertained at all by the Court, for conceding the view of the bill taken by the Court below, the case presented was *identical* with that passed upon by this Court in the case of *St. Louis, Vandalia, &c., R. R. Co. vs. Terre Haute, &c., R. R. Co.*, 145 U. S. Rep., 393. In that case the Court held that no suit for such a purpose could be maintained; and the language of Mr. Justice GRAY in that case is in every clause applicable to the bill in this case as it is represented in the opinion of the Court below. He said:

“The *object of this suit* between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, *set aside and canceled, as beyond the corporate powers* of one or both of the parties. * * * In short, by this contract, one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the State which created it, and

which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, *and would support no action or suit by either* against the other. *Thomas vs. Railroad Co.*, 101 U. S., 71; *Pennsylvania Railroad vs. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway vs. Oregonian Railway*, 130 U. S., 1; *Central Transportation Company vs. Pullman's Car Company*, 139 U. S., 24. Upon the question whether this contract was *ultra vires* of either corporation this case cannot be distinguished in principle from *Pennsylvania Railroad vs. St. Louis, Alton & Terre Haute Railroad*, above cited. * * * It may, therefore, be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and, therefore, did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other. *It does not, however, follow that this suit to set aside and cancel the contract can be maintained.* If it can it is somewhat remarkable that, in the repeated and full discussion which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this * * * The general rule in equity, as at law, is *in pari delicto potior est conditio defendentis*, and, therefore, *neither party to an illegal contract will be aided by the Court, whether to enforce it or to set it aside.* * * * If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case the plaintiff was *in pari delicto* with the defendant. The *invalidity* of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face."

The Court held that *the bill could not be maintained at all*, and affirmed the judgment of the Court below, in which it had been *dismissed on demurrer*.

To the same effect is the declaration of the Supreme Court of Massachusetts, in *Huckins vs. Hunt*, 138 Mass., 366.

“If two persons make an illegal contract, being *in pari delicto*, so long as it remains executory the law will not aid either party to enforce it, but, so far as it is executed, the law will not lend its aid to either party to relieve him from the consequences of the illegal contract or to rescind it.”

It follows, therefore, that if the original bill in this cause was in fact what it is claimed to have been, then it was a bill which, after the judgment that the lease was void, the Court could no longer entertain for any purpose; and as its subject-matter was such that it could not be entertained for equitable relief, it could not be retained to give support to a cross-bill asserting only claims of purely legal nature.

2. The filing of the so-called cross-bill was improvidently allowed, because it is, in legal effect, not a cross-bill at all but an original bill. It is founded wholly on an assertion of the legal title to property consisting of certain railway cars, contracts and money wrongfully in possession of the cross-defendant. Its prayer is for recovery of its possession, or for equivalent compensation, and for the profits derived from its use. All this is the proper and usual subject-matter of recovery in courts of law. The remedy there is adequate and complete; and the Constitution and Act of Congress exclude the jurisdiction of the court of equity. This is a suit for the recovery of personal property and the collection of a money demand under the guise of a suit in equity, and is wholly foreign to the scope of the original bill.

When the lease was held to be void, so much of the original bill as prayed equitable relief on the footing of its validity and asked aid of the Court in

giving effect to its provisions, and in performing its covenants, failed, and the bill could only be dismissed by the Court. So much of the bill as related to the *invalidity* of the lease, presented together with the cross-bill only a subject of *legal* right and title and remedy. The cross-bill, whether as a dependent of the original bill, or separately, had no place because of its subject matter in the Court of Equity, but in any aspect it was an independent and separate suit. Both under the original and cross-bills the Court itself was holden to take notice of this, and to dismiss the bills *sua sponte* (*Lewis vs. Cocks*, 23 Wall, 470; *Allen vs. Car Co.*, 139 U. S., 662). The so called cross-bill was purely an original bill, and as such the courts of the United States had no jurisdiction of its parties, and the *first demurrer* thereto should have been *sustained on that ground*.

So in *Sample v. Barnes*, 14 H., 70, the Supreme Court of the United States held that when the special averments of deception, &c., which were relied upon to make a case of *equitable* cognizance *failed to be proved* the Court of Equity *could proceed no further* on the bill, for *as the case then stood* the remedy, if any, was properly and only at law. Such a bill could not support a cross-bill; and any pretended cross-bill would be in legal effect and construction an original bill; and as such it must present *independently* and *in itself* all the primary supports and equitable qualities of an original bill (*Higgins v. McCrea*, 116 U. S., 684, p. 59 *post*).

Third.

The Court erred in not holding that the subject-matter of said cross-bill was the proper subject-matter of action at law, and of trial at law and by

jury only, both under the provisions of the seventh amendment of the Constitution of the United States and of Section 723 of the Revised Statutes of the United States.

Over the subject-matter of this cross-bill there is no jurisdiction in a court of equity.

The title to the property claimed is legal; is the subject of action at law for the recovery of the property or compensation for it in damages, and is the proper subject-matter of trial at law and by jury only.

The right to profits, if it exists, is *an incident to the title*, and must be pursued in the *same jurisdiction*. This applies equally to actions for real or personal property.

Whitehead vs. Shattuck, 138 U. S., 151.

Root vs. Railway Co., 105 U. S., 213.

Monk vs. Harper, 3 Edw. Ch., 111.

The profits or earnings can be ascertained and proved up in a suit for the recovery of the property or its value. In such case *it must be done there*. Equity has no jurisdiction.

In *The Sultan vs. The Providence Tool Co.*, 23 Fed. Rep., 572 BLATCHFORD, J., said:

“ The bill in this case is founded wholly on an *assertion of the legal title* of the plaintiff to the rifles and equipments in question. Its prayer is for a decree that the plaintiff has the title to such property and the right to its possession, and that the defendants have no title to it, or valid lien on it, or right to retain it, and that it be delivered over by the defendants to the plaintiff. A claim of such a character is, in the courts of the United States, under the distinction maintained by the Constitution of the United States between law and equity, and enforced by Section 723 of the Revised Statutes of the United States, the subject of a suit at law, and a plain, adequate and complete remedy is afforded by an action of replevin. * * *

"The bill prays that the tool company be compelled to specifically perform its undertakings with the plaintiff, and that the defendants be restrained by injunction from setting up any right or title to or lien on the property. But these prayers do not change the attitude of the case. The tool company agreed to make the articles and deliver them to the plaintiff. The plaintiff alleges that the articles have been made and paid for, and that the title to them has passed to the plaintiff. *The case is one of the enforcement of the legal title to chattels in existence*, and has no different legal aspect from what it would have had if the chattels had not been made under a contract, *but had come otherwise into the possession of the tool company from that of the plaintiff*. As to the injunction, that might be asked for in every case of the assertion of a legal title to property by a plaintiff, and thus every case of the kind be made one of equitable cognizance. The bill is not one recognizing a lien and asking to redeem from it. It asserts title and denies any lien, and prays for a delivery of the property. Then it has a second and alternative prayer, that, as to any of the property on which there is a lien, redemption therefrom be allowed. *But the suit is still a replevin suit in the guise of a suit in equity.*"

In *Scott vs. Neely*, 140 U. S., 110, the Court denied the jurisdiction in equity, because the defendant has a *constitutional* right to a trial by jury, and also *because of the prohibition* of the Act of Congress to pursue his remedy in such cases in a court of equity. The Court said:

"All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and *can be brought in the Federal courts only on their law side.*"

In *Buzard vs. Houston*, 119 U. S., 352, the Court said:

“In cases of fraud or mistake, as under any other head of chancery jurisdiction, a Court of the United States will not sustain a bill in equity to obtain only *a decree for the payment of money* by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received.”

In this case the decree itself is in form and in fact a mere judgment for money (see Record, p. 1197).

Crane vs. Lord, 101 Ill., 46.

Smyth vs. N. O. Canal, &c., Co., 141 U. S. 656.

Murphy vs. Habut, 16 Pa. St., 50.

Kunkle's Appeal, 107 Pa. St., 368.

Crampton vs. Varna Ry., L. R., 7 Ch. App., 562.

In the last of the above cases the Lord Chancellor said:

“I understand that the Master of the Rolls did not refer to the other branches of the argument, and said shortly that *the case was reduced to a money contract*. I believe he was right; and that *this being a money contract*, and not a proper subject *for specific performance*, the Court cannot give relief by way of damages.”

The remedy is at law and by the determination of a jury. The objection stands upon the *constitutional* right which excludes the jurisdiction invoked by this cross-bill.

Whatever the form of the proceeding may be, when the court of equity perceives that the subject-matter brought before it is one of the enforcement of a legal title, and of a legal right, it is without jurisdiction of that subject-matter by force of

the Constitution of the United States as well as of the prohibition contained in the Act of Congress.

Parsons vs. Bedford, 3 Pet., 433.

Root vs. Ry., 105 U. S., 206-7.

Bennett v. Butterworth, 11 How., 674-5.

Kilian vs. Ebbinghaus, 110 U. S., 572.

Cates vs. Allen, 149 U. S., 451.

Hollins vs. Brierfield, 150 U. S., 379.

Legal issues of this character cannot be drawn into chancery by merely inserting in the bill prayers for account or discovery. As said in *The Sultan vs. The Providence Tool Co.*, *supra*, such things

“might be asked for in every case of the
“assertion of a legal title to property by a
“plaintiff, and thus every case of the kind be
“made one of equitable cognizance.”

In *Hipp vs. Babin*, 19 How., 278, the Court said:

“Nor can the Court retain the bill, under the impression that a court of chancery is better adapted for the adjustment of the account for rents, profits and improvements. The rule of the Court is, that when a suit for the recovery of the possession can be properly brought in a court of equity, and a decree is given, that Court will direct an account as an incident in the cause.

“But when a party has a right to a possession which he can enforce at law, his right to the rents and profits is also a legal right and must be enforced in the same jurisdiction. The instances where bills for an account of rents and profits have been maintained are those in which special grounds have been stated to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him, or in which the complexity of the account has afforded a motive for the interposition of the court of chancery to decide the title and to adjust the account.”

In *Root vs. Railway Co.*, 105 U. S., 212, 213, the Court quoted the above language, and reasserted the same doctrine, and said:

“ These principles were announced in a case for the recovery of the possession of real estate held adversely, but *they are of general application, and embrace, as well*, the case of torts to personalty, and infringements of patent and copyrights.”

Creamer vs. Bowers, 30 Fed. Rep., 185.

Washburn, &c., Co. vs. Wire Co., 41 Fed. Rep., 410.

A bill for an accounting *cannot be maintained without showing affirmatively some other ground of equity jurisdiction to which the accounting is incidental.*

Hipp vs. Babin, 19 How., 279.

Root vs. Railway Co., 105 U. S. 213.

Hunton vs. Life Association, 45 Fed. Rep., 661.

Babbott vs. Tewksbury, 46 Fed. Rep., 86.

R. R. Co. vs. Story, 17 Conn., 364.

Badger vs. McNamara, 123 Mass., 117.

Higginbotham vs. Hawkins, *L. R., 7 Ch. App., 676.

Parsons vs. Bedford et al., 3 Pet., 433.

Root vs. Ry. Co., *supra*, 206-7.

Bennett vs. Butterworth, 11 How., 674-5.

This very question was expressly *decided between these parties* in the Court below on the applications for injunction, above referred to, and on that occasion the rule of the Court upon the subject was stated by Mr. Justice BRADLEY in the above cited opinion. The nature of the account that must be taken was urged as a principal ground of the necessity for such an injunction. The defense to those suits rested upon the proposition that

the earnings made by the operation of the service under that lease had fallen below the sum of \$264,000 per year, and that thereby the condition had occurred under which the defendant had been entitled to terminate the lease, and that it had done so. The Central Transportation Company at all times *then insisted* that the issues were such as are properly determinable *only on the common law side of the Court* (Rec., p. 63), while the necessity of a court of equity for taking an account of the earnings under this lease, so as to determine the amount which the Central Company was entitled to be paid, was one of the points most strenuously urged by the original complainant in argument, printed and oral. The conclusions of the Court are stated in the opinion of Mr. Justice BRADLEY, filed after that hearing and reported in 34 Fed. Rep., 357. In that opinion Mr. Justice BRADLEY said (Rec., p. 542):

“If the facts contended for are a good ground for relief at all, they are as available as a defense at law as in equity. *They are set up for the purpose of showing that the condition subsequent created by the eighth article of the lease, the purpose of which was to cause the covenant to pay \$264,000 per annum to cease, has been accomplished. Proof that that condition has been accomplished would be a legal defense to the action. * * ** The difficulty of proving the fact that the net revenues are less than \$264,000 a year *on account of the complication of the matters involved*, we do not regard as, *by any means, such as to draw the case into equity.* It is not a question of account *arising upon a fiduciary relation, and does not involve the principles of such an account.* It is necessary, it is true, for the complainants to show by their receipts and expenses that their net revenues are less than \$264,000, but that may be done by a mode of proof very far short of that required from a trustee or agent in rendering an account to his beneficiary or principal.”

Precisely the *same application* was presented again by the cross-bill. The question was of taking an

account of the earnings made by the Pullman Company in operating under this lease to determine how much money derived from those earnings should be paid to the Central Company. The question was precisely the same and the account to be taken identical with that presented in the original bill and considered in the opinion of Mr. Justice BRADLEY. No change had occurred *except* that the *attitude of the parties to each other* had been, upon this question, *exactly reversed*. Counsel of cross complainant asked then what he had resisted before.

Nor can the suggestion of discovery be more effective. Under the equity rule of the courts of the United States this cross-bill in effect contains no prayer for discovery at all. The cross-bill must affirmatively show the necessity of discovery not possible to be accomplished in a court of law in order to give jurisdiction in equity even for the discovery. Prayer for discovery of facts *which it is not shown could not be proved or obtained at law* will not confer that jurisdiction, and "*it is an abuse of the powers of chancery to interfere.*" In *Brown vs. Swann*, 10 P., 501, the Court said:

"The bill is deficient in the material averment, *essential* to all such bills of discovery as this is, *that the complainants are unable to prove the facts sought from the conscience of the defendant by other testimony.* * * * The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain or to compel such testimony to be given. It has no other foundation; and whenever a discovery of this kind is sought in equity, if it shall appear that the same facts could be obtained by the process of the courts of common law, it is *an abuse of the powers of chancery* to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows that the aid of equity can alone be wanted for a discovery in those cases where there is no witness to prove what is sought from the con-

science of the interested party. * * * The rule to be applied to a bill seeking a discovery from an interested party is that the complainant shall charge in his bill that the facts are known to the defendant and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony."

Babbott vs. Tewksbury, 46 Fed. Rep., 86.

Drexel vs. Berney, 14 *Ib.*, 268.

1 Pom. Eq. Jur., Section 230, page 237.

Rindskopf vs. Platto, 29 Fed. Rep., 130.

Vennor vs. Ry. Co., 28 Fed. Rep., 591.

In the light of this equity rule this cross-bill contains no prayer for discovery. The mere words "and for discovery," accompanied by no more precise demand and by no averments to satisfy the rule of jurisdiction, are mere idle words and meaningless, and are ineffectual under the equity procedure of the courts of the United States.

(3.) Not less than in an original bill must the affirmative relief sought by a cross-bill be equitable, and when the distinctively equitable relief asked by the original bill fails and is eliminated and the only elements remaining are *legal in their nature*, equity has no longer jurisdiction and the Court has no power to proceed further.

Kramer vs. Cohn, 119 U. S., 355.

Dowell vs. Mitchell, 105 U. S., 430.

Lautz vs. Gordon, 28 Fed. Rep., 264.

Story's Eq. Pl., Sec. 398.

Tobey vs. Foreman, 79 Ill., 489.

Sample vs. Barnes, 14 H., 70 (see p. 40, *ante*).

Fourth.

The Court erred in not sustaining the three several demurrers to the cross-bill.

The effect of the *first* demurrer is already discussed on pages 40-44, *ante*. The *second* and *third* demurrers were directed to those portions of the cross-bill which prayed that the cross-defendant might be deemed to be the *trustee* for the cross-complainant for the *use of* all property transferred, and for all the existing railway contracts for transportation with railways with which the cross-complainant had contracts at the time of the lease, and of all sums of money derived or *in future to be* derived from operations under them, and to account for all profits derived since the making of the lease by the use of property transferred under it.

The trust asserted is one for operating, for the *use* and benefit of *the dormant* Transportation Company, the railway transportation contracts and other property transferred under the terms and for the purposes of the illegal and void lease.

An agreed trust for such a purpose would be equally *ultra vires*, and equally otherwise unlawful with the lease itself, and equally void as to both parties. And no Court can create it or permit it. The same considerations which preclude execution by the parties of the express contract of lease equally preclude the existence of any *fiduciary* relation between them to support the claim to profits derived from the use of property transferred under the lease, which is the first prayer of the cross-bill. No such relation can be assumed. But this *use of* property and contracts *for the lessor* and this accounting for profits and earnings of the business so conducted could have no other basis.

A bill for an account of profits made by the use in business of the property transferred under this lease

is a bill to enforce *directly* the illegal contract and to secure its fruits. (*Snell vs. Dwight*, 120 Mass., 19; *Leonard vs. Poole*, 114 N. Y., 371; *Samuels vs. Oliver*, 130 Ill., 73; *Croft vs. McConoughy*, 79 Ill., 346.)

It would simply give effect by circuitry to the void lease, because giving to the *dormant* Transportation Company the profits and benefit of the use of the same property through the medium of the same illegal assignment, and under the same illegal conditions, except the specific compensation. It would still enable the Transportation Company "to continue in existence for no other purpose" than that of receiving "compensation for not performing its duties"; it would still give effect to the ascertained intention of the two corporations "to prevent competition and create monopoly," to the *illegal assignment* of property, and to the *abandonment of its public duty* by the cross-complainant. The *actual use* made of the property, the *profits of which* are claimed, was the *identical use provided for in the contract*. The trust would be an unlawful relation to assume by an *express* contract. Therefore, the Court cannot impose an *implied* contract which would be equally unlawful. "*The law never implies an obligation to do that which it forbids the party to agree to do*" (FIELD, Ch. J., in *Zottman vs. San Francisco*).

It is not enough to *aver* the possession of property, and that it is held on a trust. A trust relation is a *deduction of law*, and it must be *shown how the trust arose* (*Jackson vs. No. Wales Ry. Co.*, 1 H. & Tw., 84). No relation of the Transportation Company at all to this property can be shown, except by recourse to the lease and allegation of the actual transfer. How *otherwise* is a trust to operate a sleeping car business for the Central Company to be grafted upon the *mere act of assignment* of contracts and property?

No valid trust can be founded on an interest which

depends upon an illegal contract, nor can any trust be established in contravention of the policy of the law.

The principle is thus stated in Hill on Trustees:

“ But no valid trust can be founded on an interest derived from an illegal contract, or established *in contravention of the general policy of the law*. Thus, in the case of an officer's half-pay, or a gaoler's fees, or a right to property depending on the issue of a suit then pending, or any interest the assignment of which is forbidden by the law on the ground of public policy, the Court will not recognize any trust which is attempted to be attached on a disposition of such property, for such a trust would be in direct violation of those rules of law.

Hill on Trustees, *45.

Curtis vs. Perry, 6 Ves., 739.

Nassau Bank vs. Jones, 95 N. Y., 115.

This subject and the right to earnings or profits made under the lease must arise for further discussion under other assignments of error (*vide post*). The foregoing suggestions relate to the matters embraced in the first eight assignments of error (Rec., p. 1200); and substantially compose the first group of assignments of error as mentioned on page 29.

Fifth.

The Court erred in holding the cross-complainant entitled, under the circumstances stated in the cross-bill, to any affirmative intervention of the Court on its behalf relating to property transferred for the purposes of the illegal lease, or to earnings made by the use thereof.

We come now to those assignments of error which deny the right of the cross-complainant in any court

of law or of equity to the affirmative relief demanded by this cross-bill and accorded by the Court below. The denial is based upon the nature of that undertaking as that is defined in the judgments of this Court.

When this cross-bill was filed the original complainant had never refused to restore or compensate for every particle of property *actually received by it* under the lease. All property susceptible of being restored, it *had offered to the defendant*, and it had been *refused*. We could not restore the Central Transportation Company to operation of the service on the roads originally under contracts with it, even if any obligation on that account had existed, for they were all gone equally from it and us. Moreover, it had no capacity to operate them; but that, at least, was not our fault more than its own. *Nor would those roads, after all their effort to get rid of that agency, permit it again to enter on their lines.* We had asked the Court to take possession and care by a receiver of the cars remaining in existence, and that they might be sold to avoid waste; but this the defendant *had opposed* and the Court had accordingly refused, and from the time the lease was declared void the defendant has never been obstructed in taking possession of any part of the property in existence; and we submit that this fact *should be accorded more consideration than it has received in measuring the alleged responsibility of the cross-defendant.* Up to the filing of this cross-bill, there was never a time when the original complainant was not willing and ready to restore to the defendant or make compensation for all property it could fairly be claimed to have received under the lease. Indeed, the proposals which had been made by the original bill, but which had been *peremptorily rejected*, went far beyond that limit. As to *what property it might be held to have so received*, there was wide difference of opinion; but the extraordinary demands presented by the cross-bill made any composition impossible. We were willing to pay

for all actual tangible property received, but the contracts and patents that expired and other elements of the so-called property, which were all consumed and used up in the operation of the service, we insist we *had already paid for* with nearly \$4,000,000 to the cross complainant. We deny an obligation to pay for these *again under the guise* of their *value as a part* of the "*plant*" in 1870, or under any *other name*. The extravagant *demands of this cross-bill* have driven us in this litigation to stand on the defensive position afforded by what seem to be, in the courts of every country, settled rules of law. It grounds its prayer for relief directly upon the original illegal contract, and more particularly upon *implied* contracts said to arise from the *illegal acts done under it* to carry out its purposes. Those were *the very acts* whose *inherent* illegality made the *original contract itself void*.

The contract has been held unlawful and void because *ultra vires*, and because, in violation of public policy and *of its public duty the cross-complainant* disabled itself from performance of its public functions. This, said the Court in *Thomas v. Ry. Co.*, 101 U. S., 83, and again in 139 U. S., 43, "is "*another principle of equal importance, and equally* "*conclusive against the validity* of this contract." In the language of Mr. Justice GRAY in *St. Louis, &c., R. Co. vs. Terre Haute, &c., R. Co.*, 145 U. S., 393, it

"stood in the position of alienating the
 "powers which it had received from the State,
 "and the duties which it owed to the public,
 "to another corporation, which *it knew* had
 "no lawful capacity to exercise those powers
 "or to perform those duties."

The rule is universally established that in such case no aid at all will be given to one party against the other in respect to the contract *or to anything done under it*. On the contrary, every court will refuse to interfere, and will leave the parties just where they have placed themselves.

"We will not assist an illegal transaction in any respect," said Lord ELLENBOROUGH. "We leave the matter as we find it; and then the maxim applies, *melior est conditio possidentis*" (*Edgar vs. Fowler*, 3 East., * * * 225).

The rule is equally explicit in the Supreme Court of the United States. In *Bank vs. Owens*, 2 Pet., 538, the Court said:

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is *itself illegal* * * * Nor is the rule applicable only to contracts expressly forbidden, for *it is extended to such as* are calculated to affect the general interest and policy of the country."

In *Wheeler vs. Sage*, 1 Wall., 518, the Court refused to hold one party amenable to others where all alike were originally engaged in a scheme to get certain real estate by process of misleading other creditors, and said:

"A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, '*in pari delicto potior est conditio defendentis*,' must prevail."

In *Miller vs. Ammon*, 145 U. S., 421, the defendant in error sued in the Federal Court in Iowa to recover the purchase price of wine sold in Chicago. Defense was that the sale violated a municipal ordinance, and being an unlawful act created no right of action. To this demurrer was sustained and judgment rendered. This Court, by Mr. Justice BREWER, said:

"The general rule of law is * * * that
"when a plaintiff cannot establish his cause
"of action without relying upon a illegal con-

“tract, he cannot recover. Pollack’s Principles of Contracts, pp. 253 to 260. * * *
 “In *Bank vs. Owens* (2 Pet., 527, 539) this Court said: ‘There can be no civil right
 “‘where there can be no legal remedy; and
 “‘there can be no legal remedy for that
 “‘which is itself illegal.’” The Court reversed the judgment below, saying that nothing “excepts this case from the ordinary
 “rule that *an act done in disobedience to the law creates no right of action* which a court
 “of justice will enforce.”

It is hard to imagine what can be wanting in the judicial utterances of this Court to establish the position which we here maintain. Equally explicit is the Supreme Court of Massachusetts.

In *King vs. Green*, 6 Allen, 139, the Court says:

“It is true that the law would not enable the defendant to recover such a debt (*Way vs. Foster*, 1 Allen, 408). But *neither will it enable the plaintiff to recover back his property given in pledge for the debt, any more than to recover back the money after paying it.* In all such cases the maxim *portior est conditio possidentis* is applicable. The plaintiff has, at least, as little claim to the aid of the law as the defendant.”

In *Huckins vs. Hunt*, 138 Mass., 366, the Court said:

“If two persons make an illegal contract, being *in pari delicto*, so long as it remains executory the law will not aid either party to enforce it, but, so far as it is executed the law will not lend its aid to either party to relieve him from the consequences of the illegal contract or to rescind it.”

In *Atwood vs. Fisk*, 101 Mass., 364, the Court says:

“But it has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, *neither will it relieve a party to such a contract who*

has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own question in such cases without the aid of the courts.

"In the somewhat quaint language of Lord Chief Justice Wilmot in *Collins vs. Blantern*, 2 Wils., 350, 'all writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O procul este profani*.'" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other. And so the modern doctrine is established that relief is not granted where both parties are truly *in pari delicto*."

Ham v. Smith, 87 Pa. St., 66.

See also : *Johnson vs. Hulings*, 103 Pa. St., 498; *Myers vs. Meinrath*, 101 Mass., 366; *Thomas vs. Richmond*, 12 Wall., 349; *Brown vs. Tarkington*, 3 Wall., 377; *Randall vs. Howord*, 2 Black, 585; *Bartle vs. Coleman*, 4 Pet., 184; *Dent vs. Ferguson*, 132 U. S., 50; *Harris vs. Runnels*, 12 How., 79.

Naturally one inquires what modification under special circumstances may be recognized to a rule thus unqualified and established in the interest solely

of public security. As might be expected from the principle which is dominant, such recognition is within *narrow limits* and is well *defined*.

There are many cases in which courts have granted relief between parties where the basis for relief could be found without touching at all upon the illegal contract. An illustration is the case of *Hitchcock vs. Galveston*, 96 U. S., 341, where the *illegality* lay, *not in the undertaking to pay*, but in the undertaking to pay in bonds whose issue would be *ultra vires*. Can it be said in this case that the *illegality* lay not in the undertaking to transfer, nor in the *act of transfer*? So relief has been given when it could be founded upon some *subsequent* or *other* contract altogether independent of the original one held to be violation of law. And some courts have sought to distinguish a contract merely *ultra vires*—not affirmatively *violative* of any law, but negatively unlawful, and therefore void, because the *juristic* person, the corporation, had not by the law of its creation been made capable of making it. Such contracts may have no moral color or obnoxious quality whatever. Counsel has always dwelt with *iteration* upon the language of this Court in the case in which this lease was held void, as if it involved an intimation that recovery might be had in this case, though the Court expressly declared that the question need not be considered because it was *not presented by the record*, and had not been argued. The language referred to is given in the note below.* But none of

* "The ground and limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.'" *Pennsylvania Railroad vs. St. Louis, &c., Railroad*, 118 U. S., 317.

"Whether this plaintiff could maintain any action against this defendant,

these considerations enter into this situation. This lease was held void, not merely because *ultra vires*, but because it was a violation by the lessor of public policy and of public duty; because its undertaking involved an abandonment of its public service; a transfer of all its property and business to another corporation by which it disabled itself from performance of that public service; and an *express covenant* that it would not perform that service for nearly its whole term of incorporation. Then if the *action* be founded not in terms upon the contract of lease but upon those *very acts* of transfer, of abandonment, and of *self-disabling*, whose intrinsic illegality was itself the operative thing which vitiated the contract, there is found in them no subsequent, independent and innocent basis of relief. When this Court says it will *inquire* whether relief can be given *independently* of the contract, or whether it will refuse to interfere as the matter stands, what does it mean by relief given "independently of the contract"? Certainly, it does not mean that it will enforce a claim based on *the very acts* whose own *inherent* illegality had the effect to make the contract void. It does not mean to antagonize the "ordinary rule" stated by Mr. Justice BREWER (p 59, *supra*), "that an act done in disobedience to the law creates "no right of action which a court of justice will "enforce."

It seems to us that in the language of this Court is a plain statement of the broad rule that where a contract *ultra vires* "has been partly performed," and "property has passed" under it; "where the parties have so far acted under such a contract that they

"in the nature of a *quantum meruit*, or otherwise, independently of the "contract, need not be considered, because it is not presented by this "record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose "of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above "stated, the defendant is not liable for." 139 U. S., 60.

cannot be restored to their original condition" the Court "will refuse to interfere," but will leave the parties where they have placed themselves. If any relief can be ever given it must be on grounds *independent* of the contract, or of *acts in performance of it* equally illegal with the contract. It must be on grounds so independent that *they can be shown without showing the contract or any illegal acts done under it*. The rule of this Court is coincident with that laid down in *Kearley vs. Thomson*, 24 Q. B. Div., 742, in the Court of Appeal, and which we have quoted on pages 69 and 80 *post*.

The rule in this case, and the one which governs this cross-complainant, is clearly stated by MERCUR, J., in *Holt vs. Green*, 73 Pa. State, 200, where he said:

"The test whether a demand *connected with an illegal transaction is capable of being enforced by law is whether the plaintiff requires the aid of the illegal transaction to establish his case* (*Swan vs. Scott*, 11 S. & R., 164; *Thomas vs. Brady*, 10 Barr, 170; *Scott vs. Duffy*, 2 Harris, 20). If a plaintiff CANNOT OPEN HIS CASE WITHOUT SHOWING THAT HE HAS BROKEN THE LAW, a court will *not assist him* (*Thomas vs. Brady, supra*). * * * The principle to be extracted from all the cases is that *the law will not lend its support to a claim founded on its own violation*" (*Coppell v. Hall*, 7 Wallace, 558).

This language of Judge MERCUR describes with exactness the situation here. Whatever property was delivered was so delivered solely for the illegal purposes of the lease which has been adjudged illegal and void. There has been no subsequent or other contract or transaction between the parties. The cross-complainant *cannot "open its case"; it cannot trace its property into the hands of the defendant, nor show that it ever had possession of or title to that property without recourse to the illegal contract and the act of delivery under it*. Nor does the cross-bill *attempt to do so*.

Sir WILLIAM GRANT said in *Thomson vs. Thomson*, 7 Vesey, *473:

"Then how can you get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. *Here you cannot stir a step but through that illegal agreement, and it is impossible for the Court to enforce it.* I must, therefore, dismiss the bill."

In *Sykes vs. Beadon*, 11 Ch. Div., 193, JESSEL, M. R., quoted further from the above judgment and said:

"A man procures smuggled goods, and keeps them, but refuses to pay for them. So in the underwriter's case, an insurance contrary to the act of Parliament, the brokers had received the money, and refused to pay it over, and it could not be recovered. No matter who complains of it, the thing is illegal. *You have no claim to this money except through the medium of an illegal agreement*, which, according to the determinations, you cannot support. Now, I apply that exactly here. You have no claim against Mr. Lloyd to compel him to make good the loss, *except through the medium of this illegal agreement or contract.*"

In *Clements vs. Yturria*, 81 N. Y., 290, 291, FOLGER, Ch. J., said:

"It was a contract grossly against public policy and void. Judicial aid will not be given to enforce such a contract, *nor to maintain a claim that rests solely upon it.* * * * The question, then, with us is this: Did the plaintiff ever have such a right or interest in the property, as that *without proof of the contract he could have shown himself entitled to have immediate possession of it?*"

In *Kearley vs. Thomson*, 24 Q. B. Div. (1890), 742, FRY, L. J., with the concurrence of Lord COLERIDGE, C. J., said:

"As a general rule, where the plaintiff cannot get at the money which he seeks to re

cover without shewing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may thus be stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back *without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract.*"

In *Coppell vs. Hall*, 7 Wall., 542, Mr. Justice SWAYNE said:

"Whenever the illegality appears, whether the evidence comes from one side or the other, *the disclosure is fatal* to the case. No consent of the defendant can neutralize its effects. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. *The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation.*"

In every possible aspect of this case the claim is *founded on the violation of law*. So far as it rests upon the lease it is founded on an express contract which has been adjudged void for that reason. So far as it rests upon *acts* of the parties, it is *founded upon the very acts whose inherent violation of law made the lease unlawful and void*. The transfers and assignments made under the lease were not adjudged ineffective because *they were connected with an otherwise illegal contract*; but it was the *illegality inherent in these assignments and transfers which made the contract illegal and void*. It was the violation of law inherent in these *acts* which poisoned the whole transaction. If by reason of this intrinsic illegality no *express* contract can be founded on them, how can the law raise and enforce any *implied* contracts founded on the same violation?

In *Higgins vs. McCrea*, 116 U. S., 684, the defendant sought *by a cross-action* to recover money paid to the plaintiff under some Board of Trade contracts made illegal by statute. This Court said:

"The defendant's counterclaim is, therefore, to be tested by the same rule as if it had been the basis of an independent action, and the question is whether under any circumstances the defendant should have been allowed upon the pleadings and evidence to recover a judgment thereon. * * * The *cross-action* of the defendant, as an *independent suit*, it is clear, could *not have been maintained*. The Court was bound to take *judicial notice* of the fact that the dealings recited in the counterclaim were forbidden by law, and of its own motion should have directed a verdict against the defendant thereon (*Oscanyan vs. Arms Company*, 103 U. S., 251). If the defendant had withdrawn his counterclaim and docketed it as a separate suit against the plaintiffs, as permitted to do by the Code, it needs no discussion to show that his action must have failed. His rights are not changed by the fact that the two causes go on *parri passu*, and are tried at the same time. *We do not see on what ground a party who says in his pleading that the money which he seeks to recover was paid out for the accomplishment of a purpose made an offense by the law and who testifies and insists to the end of his suit that the contract on which he advanced his money was illegal, criminal and void, can recover it back in a court whose duty it is to give effect to the law which the party admits he intended to violate.*"

In these last ten lines this Court has stated with as much accuracy as is within the power of language the exact case presented by this cross-bill.

Violation of Public Policy is Vicious.

There are some cases which assert as a rule that where a contract is merely *ultra vires* and has no other moral color and has been partially executed,

relief may be given upon it to the extent of the recovery of property which has passed under it, or compensation for its use. The type, and the principal one, of such cases is *Bath, &c., Co. vs. Claffy*, 151 N. Y., 24. This is the position attempted to be held by the Court below. It asserts this principle, or rule, and holds that the present case is one of a contract *ultra vires* and no more. It declares in express terms, that that is "all that can justly be said of it."

But nothing of this has application here because *first*, there is no such rule recognized in this Court, and *second*, the contract in question is *not* one merely *ultra vires*. (1) This Court has declared its rule to be that contracts merely *ultra vires* are absolutely void, but nevertheless, *where money or property has passed under them, or the parties have so far acted under them, that they cannot be restored to their original position, it will inquire whether independently some ground of relief may be found.* If no such *independent* ground of relief appears, however, the Court *will refuse to interfere*. (2) This present contract has been construed by this Court, and it has been held *not* to be one merely *ultra vires*. It has been held to be void because *ultra vires* and *also because*, in violation of public policy it involved the cross-complainant in an abandonment and a disabling of itself from the performance of public duty. That, said the Court, is *another principle of equal importance and equally conclusive* against the validity of the contract (101 U. S., 83; 139 U. S., 43); and nothing in *Bath, &c., vs. Claffy* is applicable to the present situation. The case thus decided by this Court has been reviewed with much elaboration by the Judge below and a different conclusion reached. This Court said: "The NECESSARY CONCLUSION is, that the contract was unlawful and void *because* it was beyond the powers conferred by the Legislature AND BECAUSE it involved an abandonment * * * of duty to the public." In the Court below the Judge says: "ALL THAT CAN

JUSTLY BE SAID IS that the parties misconstrued their authority and that the lease is consequently *ultra vires*." Upon that conclusion the decree is founded below. We insist, however, that in the Court below this question was *not open for his consideration at all*.

The contract being unlawful and void, therefore, not merely because *ultra vires*, but also because in violation of *public policy*, it is void upon grounds which all Courts, everywhere, recognize as precluding interference.

For violation of public policy is immoral. An act of the most neutral and harmless character may be prohibited by statute or not authorized by charter; but an act is made void for its violation of public policy because it is *so inherently obnoxious to the public welfare and security* that independently of any statute or prohibition it cannot be permitted, and, as a *matter of public protection, will be repressed* by the Courts. In *Bishop vs. Palmer*, 146 Mass., 474, the Court, speaking specifically of a contract in *restraint of trade*, one of the very reasons for which this lease was held void, said:

"It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise not enforceable at law. *But a contract in restraint of trade is held to be void because it tends to the prejudice of the public.* It is therefore deemed by the law to be not *merely an insufficient or invalid consideration* BUT A VICIOUS ONE. *Being so it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal.*"

In *Kearley vs. Thomson*, 24 Q. B. Div., 742, the defendants were solicitors, and in a bankruptcy proceeding "undertook not to attend on the debtor's public examination or to oppose his discharge, provided the plaintiff paid them an agreed sum" for

costs ordered to be paid out of the estate, but which from want of assets had not been paid. On this account the plaintiff had paid £40, and the plaintiff demanded and sued for repayment.

The Court said:

“ The *tendency* of such a bargain as that entered into between the plaintiff and the defendants is obviously to *pervert the course of justice*. Although the defendants were under no obligation to appear, they certainly were under an obligation *not to contract themselves out of the opportunity* of appearing. * * * As a general rule where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed. * * * It follows in the present case that the plaintiff who paid the £40 cannot recover it back without shewing the contract upon which it was paid, and when he shews that he shews an illegal contract. * * * *What is the condition* of things if the illegal purpose has been *carried into effect in a material part* but remains unperformed in another material part? As I have already pointed out in the present case, the contract was, that the defendants should not appear at the public examination of the bankrupt, or at the application for an order of discharge. It was performed as regards the first; but the other application has not yet been made. *Can it be contended* that if the illegal contract has been *partly* carried into effect, and *partly* remains unperformed, *the money can still be recovered?* In my judgment *it cannot be so contended with success*. Let me put an *illustration* of the doctrine contended for, which was that partial performance did not prevent the recovery of the money. Suppose a payment of £100 by A to B on a contract that the latter shall murder C and D. He has murdered C, but not D. Can the money be recovered back? In my opinion it cannot be. *I think that case illustrates and determines the present one.*

“ I hold, therefore, that where there has been a *partial carrying into effect* of an illegal purpose, *in a substantial manner*, it is impos-

sible, though there remains something not performed, *that the money paid under that illegal contract can be recovered back.*"

The illustration employed by the Court in *Kearley v. Thomson* sufficiently indicates its view that contracts in violation of public duty and of public policy are inherently "vicious," and are not destitute of moral color or of "turpitude."

It is the claim that this lease was merely *ultra vires* and involved no other vicious or obnoxious element, that has been relied upon in the Court below to wrest the present case from the settled rules. The proposition is asserted in the opinion (Rec., pp. 747-8), "that the courts will interfere to compel "restitution of property, under such a contract, by "one who repudiates it *except* when the contract "involves *moral turpitude*." He further says: "What constitutes 'moral turpitude,' or what will "be held such, is *not entirely clear*. A contract to "promote crime certainly involves it. A contract "to promote public wrong, short of crime, may or "may not involve it. If parties *intend* such wrong, "as where they conspire against the public interests "by *agreeing to violate the law or some rule of public policy*, the act doubtless involves moral turpitude." Citing definitions from dictionaries, indicating *intense degrees* of baseness or vileness of principle as involved in the word "turpitude," the Court enters into an earnest argument to vindicate the immunity of the cross-complainant from blame, or any degree whatever of culpable intention, asserts that the "question of interpretation" "was a close and difficult one," and arrives at the following conclusion: "*All that can justly be said, therefore, is "that the parties misconstrued their authority, and "that the lease is, consequently, ultra vires*" (Record, pp. 1132, 1195).

It is not to be obscured that this is the *first* vital question presented in the conclusion of the Court below; whether an express and unequivocal agree-

ment for the violation of public policy is or is not deemed by the law to be of that character which precludes affirmative intervention of courts on behalf of either party against the other. The one purpose of the argument presented in the opinion above cited is to show that such an agreement in the present case made the consideration of a contract free from any moral taint, and contained no element deemed vicious or immoral *by the law*. Upon this question this case turns in the *first* instance. Subsequent questions, and whether they arise or not depend upon the determination of this one. For this reason argument is strenuously adduced to support the proposition that the cross-complainant did not know that its contract was obnoxious to law nor was bound to notice it until *informed by the cross-defendant*; and that it supposed it had legislative authority for the covenants it made. This is held to justify the legal conclusion that the contract and acts of the cross complainant were void of any moral color, and innocent; that the lease was merely *ultra vires* technically and *nothing more*, and that the cross-complainant must not be *visited with knowledge* of its illegality or with any *intent* obnoxious to the law. On the contrary, we insist that in the *first* place this question had been settled by this Court between these parties, and adjudged, and was *not open* to the Court below; and in the *second* place that the conclusion of that Court has no support from any facts shown in the record.

Recurring to the opinion of the Court below, it is plain that this transaction did not offer itself to the mind of the Supreme Court in this guileless aspect; nor present a "question of interpretation" which seemed to be "a close and difficult one." Construing the special Act of 1870 this Court held, that in the matters of *leasing or transferring* its "railway cars" and "other personal property," it conferred on the cross-complainant merely the "*right to do as it had been doing* * * * in the regular course

of its business." It said: "The EVIDENT PURPOSE
 " of the Legislature, in passing the Statute of 1870,
 " was to enable the plaintiff THE BETTER TO PERFORM
 " its duties to the public. * * * An INTENTION
 " *that it should immediately* ABDICATE THOSE POWERS
 " AND CEASE TO PERFORM THOSE DUTIES IS SO INCON-
 " SISTENT WITH THAT PURPOSE that it cannot be
 " implied" from any expressions to be found in this
 statute (Page 77 *post*, note). Then this Court pro-
 ceeded to consider the contract which was actually
 made, and it said:

" By the contract between these parties, as
 expressed in the indenture sued on, are trans-
 ferred all cars already constructed, all exist-
 ing contracts with railroad companies for
 running cars, all existing patent rights under
 which other cars might be constructed, and
 all other personal property, moneys, credits
 and rights of action of the plaintiff. But
 after the cars and the railroad contracts may
 have *ceased to exist*, and after all those
 patent rights must have expired, the inden-
 ture is still to continue in force for the full
 term of ninety-nine years, unless sooner ter-
 minated as therein provided. In addition to
 all this, the *plaintiff covenants*, in the most
 express and positive terms, never to 'engage
 in the business of manufacturing, using or
 hiring sleeping cars,' while the indenture re-
 mains in force. In short, the plaintiff not
 only *parts with all its means of carrying on*
the business, and of performing the duty, for
which it had been chartered, of transporting
 passengers and making and letting cars to
 transport them in, but it undertakes to *trans-*
fer, for ninety-nine years, nearly co-extensive
 with the duration of its own corporate exist-
 ence, the whole conduct of its business, and
 the performance of all its public duties, to
 another corporation, and to continue in exist-
 ence, during that period, for no other purpose
 than that of receiving, from time to time,
 from the other corporation the stipulated
 rent or compensation, and of making divi-
 dends out of the moneys so received.

" Considering the long term of the inden-
 ture, the *perishable nature of the property*

transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties."

It is plain, therefore, that the Judge below was not justified in his zealous exoneration of the cross-complainant from all illegal purpose in this illegal lease, nor in the assertion that *it supposed*, or had reason to suppose, that the Legislature *ever intended* by the Act of 1870 to authorize what was actually done, as it is detailed by the Supreme Court in the above citation. That Court had held that the "EVIDENT PURPOSE of the Legislature in passing the "Statute of 1870 was to enable the cross-complainant "THE BETTER TO PERFORM its duties to the public." Nor was he justified in the assertion that "it must not, therefore, be visited with knowledge of the invalidity * * * until the Pullman Company * * * raised the question;" nor in the conclusion that "all that can justly be said, therefore, is that "the parties misconstrued their authority, and that "the lease is, consequently, *ultra vires*." By all these phrases the consequences of this court's judgment are minimized and evaded, and its conclusions and forcible language are skillfully dissipated into air and disregarded. The contract described by the Supreme Court was something far more than merely *ultra vires*. It was, and was in-

tended to be, an *extreme violation of public policy*, which, under the ruling of the courts of New York, Pennsylvania and Massachusetts above cited, is classed among those contracts, "vicious" and immoral, with the consequences of which courts will not interfere. It far transcended any authority that *could have been supposed* to have been conferred by the Legislature, or which it was *ever asked to confer*.

In the application of the Central Transportation Company to the Legislature for new powers and extension of its charter, it gave no hint to that body that it contemplated such a transaction as this lease embodies. It asked for additional corporate life—additional capital, and new and additional powers. It *impliedly represented* that it was *intending* under some form of arrangement and contract, new and extended corporate activity. It intimated not only its purpose to hold itself permanently capable of the discharge of its corporate functions, but that it was actually contemplating a more comprehensive performance of its public service. There is not a shadow of reason for saying that it ever supposed the Legislature had intended to authorize it to make the contract which this court has thus analyzed and held void, namely, to abandon forever its powers and resources, old and new, and the performance of its duties to another corporation; and, moreover, to *enter into an express and positive covenant that it would never* do any of the acts or perform any of the public service for the performance of which it asked new powers and functions. All this the Supreme Court has expressly dwelt upon in detail, and the earnest advocacy contained in the language of the opinion below is quite unjustified by the facts, and disregards and rebukes the criticisms which are contained in the judgment of this Court.

The Central Transportation Company *knew* that the Legislature in its Act of 1870 *never contemplated the covenants* of this lease. We submit that the

Statute of 1870 was *never* "supposed to confer full authority to make" *this* contract. No evidence whatever "shows that the statute was procured for the express purpose of granting" such authority. No indication exists that the Legislature had ever the slightest intimation that *such* a contract was contemplated. Exactly the contrary was expressly declared by this Court (139 U. S., 51). The Central Transportation Company *knew* that it had never asked for or received authority to *abandon all its public duties*; to make a positive *covenant never to exercise* any of its corporate functions *anywhere*; and, having obtained an extension of its corporate life, to continue thereafter in existence "for the *single purpose of receiving compensation for not performing its duties.*" It *never* asked or ventured to ask the Legislature openly for *authority* for such a proceeding. The violation of public policy which it knowingly and intentionally engaged in made its contract void, and void for the precise considerations upon which courts always refuse to interfere, but leave the parties where they have placed themselves (*Holt vs. Green*, 73 Pa. St., 200; *Clements vs. Yturria*, 81 N. Y., 290, 291; *Bishop vs. Palmer*, 146 Mass., 474; *Atwood vs. Fisk*, 101 Mass., 364; *Huckins vs. Hunt*, 138 Mass., 366; *King vs. Green*, 6 Allen, 139. The degree of obliquity which the parties in their own minds associated with their undertaking is immaterial. The law makes that subject its own care in its guardianship of the public interest and security. Under the settled rule of this Court, declared in a case of contract *ultra vires* (*St. Louis, Vandalia, &c., R. R. vs. Terre Haute, &c., R. R.*, given in the foot note on page 76 *post*), the cross-complainant *must be visited with knowledge of the invalidity*, and the earnest exoneration in the opinions below is without authority of any sort whatever.

With all due respect, we might inquire in what code of jurisprudence the learned Judge below found

the principle that the legal consequences of contracts violative of public policy were determined, not by the nature of the contract, but by the intent of the parties, and might be avoided by averments and insistence that the parties were guileless and intended no wrong; that they merely misconstrued the law, and that the case was merely one of disagreement on a question of interpretation between their advisers and the Court. In the light of it, however, we venture to put within easy comparison the rulings of this Court and the subsequent rulings of the Court below for illustration of other possible disagreements of opinion.*

Distinction has sometimes been sought on the ground that the parties were not *in pari delicto*,

From Opinions of the Supreme Court of the United States:

* "In the case at bar the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was *beyond the defendant's corporate powers*, and, therefore, unlawful and void, of which the plaintiff was BOUND TO TAKE NOTICE. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it *knew* had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The *invalidity* of the contract, in view of the laws of which both parties were bound to take notice, WAS APPARENT ON ITS FACE" (145 U. S., 408, *St. Louis, Vandalia, &c., R. R. Co. vs. Terre Haute, &c., R. R.*).

From Opinions of BUTLER, J., in this cause in the Circuit Court:

"Both parties firmly believed the lease to be valid; they were so instructed by eminent counsel, and were therefore justified in the belief. It was not until after the lapse of many years, when the property was irretrievably lost to the transportation company, that IT HAD CAUSE TO DOUBT the validity of the lease. IT MUST NOT, THEREFORE, BE VISITED WITH KNOWLEDGE OF THE INVALIDITY, and the consequences of such knowledge, UNTIL THE PULLMAN COMPANY changed its position and raised the question" (Rec., p. 1195).

"Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace Car Company involves moral turpitude, as before described, the former may recover back the property parted with under it. That it does not involve *such* turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful.

and one was less guilty than another. But no such distinction prevails in the courts of the United States, nor would it be available in this case. Here this lease was held void specifically for the wrong of the cross-complainant. This Court said it was not necessary to inquire into the powers of the defendant, the Pullman Company. It was the Central Transportation Company that had exceeded the powers of its charter; it was that company that had abandoned its public duties; it was that company which had covenanted not to exercise any of its functions during the remainder of its corporate

This court also, in *Cent. Tr. Co. vs. Pullman's Pal. Car Co.*, 139 U. S., 51, speaking of the lease now in question, stated as the *first* of three *distinct* grounds upon which contracts made by a corporation beyond the scope of its powers are void, "the obligation of every one "contracting with a corporation, "to take notice of the legal limits of "its powers." (See also *McCormick v. Market Bank*, 165 U. S., 549, 550; *Cal. Bank v. Kennedy*, 167 U. S., 368.) The Court further said:

"THE EVIDENT PURPOSE of the Legislature, in passing the statute of 1870, was to enable the plaintiff THE BETTER TO PERFORM its duties to the public by prolonging its existence, doubling its capital and confirming, if not enlarging, its powers. AN INTENTION that it should immediately ABDICATE THOSE POWERS AND CEASE TO PERFORM THOSE DUTIES IS SO INCONSISTENT WITH THAT PURPOSE that it cannot be implied without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute."

"In addition to all this, the plaintiff covenants, in the most, express and positive terms never to engage in the business of manufacturing, using or hiring sleeping

The statute of 1870 was supposed to confer full authority to make it. The State had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. THE QUESTION WHETHER THE STATUTE DID OR DID NOT GRANT IT WAS A CLOSE AND DIFFICULT ONE. The learned counsel of the parties and the Court disagreed on the subject. It was a question of interpretation. In the Court's view the lease was *ultra vires* and void; in the counsel's it was authorized and lawful.

life, and it was that company that had covenanted to exist "for the single purpose of receiving compensation for not performing its duty."

Upon the question of whether relief can be given under an illegal contract by restoration of parties to their original condition, and permitting the recovery of property transferred under it, the Supreme Court has defined the line upon which it will act. In *Pennsylvania Railroad vs. St. Louis, &c., Railroad*, 118 U. S., 317, the Court said: "Looking at the case as one where the parties have so far

cars,' while the indenture remains in force.

"Considering the long term of the indenture, the *perishable nature* of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal in the indenture itself of the *intention of the two corporations to prevent competition and to create a monopoly*, there can be no doubt that the *chief consideration for the sums to be paid* by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars, and that the *real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.*

"The NECESSARY CONCLUSION from these premises is that the contract sued on was *unlawful* and void, because it was beyond the powers conferred upon the plaintiff by the Legislature, and because it involved AN ABANDONMENT by the plaintiff of ITS DUTY TO THE PUBLIC."

True, it violated a rule of public policy, but this was only because the Court construed the statute more narrowly than the legal advisers of the parties had done. The Legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen.

ALL THAT CAN JUSTLY be said, therefore, is that the parties *misconstrued* their authority, and that the lease is consequently *ultra vires*" (Rec., p. 1132).

acted under such a contract that they cannot be restored to their original condition, the Court inquires *if relief can be given independently of the contract*, or whether it will refuse to interfere as the matter stands?" And it repeats this language in *Central Trans. Co. vs. Pullman Company*, 139 U. S., 57. The Court asserts again and again, that whatever may be done in such situations is not in affirmance or execution of the illegal contract, but distinctly in disaffirmance of it. When the Court inquires, therefore, "*if relief can be given independently of the contract*," the inquiry is whether, as in the cases hereinbefore referred to, there can be found any *subsequent or collateral or independent contract*, express or implied, in pursuance of which a restoration of property may be enforced without *any execution*, direct or indirect, of the illegal contract, and without *any resort whatever* either to the terms of that contract or to *any unlawful thing which the parties may have done in pursuance of it*. If no such independent contract exists, and no such conditions, no relief can be given (*Vid.* p. 63 and 67, *ante*).

The present case, being one of contract and of transactions in violation of public policy, in restraint of trade, in abandonment of public duty, as well as *ultra vires*, is distinctively of the class of those to which the strictest language of the courts is applied in their refusal to interfere, and in their assertion of the inflexible rule that parties will be left where they have placed themselves. In *St. Louis, Vandalia, &c., R. R. vs. Terre Haute, &c., R. R.*, *supra*, this very case is cited as an illustration of the class of contracts which, being absolutely void, admit no interference of the Court in aid of either party in any respect. There is no qualification of the rule that property or money *delivered under an illegal contract to promote the illegal purpose* cannot be recovered by the aid of any court of law or equity. Still less can courts relieve against the consequences of *acts which were inherently of such*

illegal character, that it was the undertaking to *do them* which made the contract illegal and void.

Higgins vs. McCrea, 116 U. S., 24.

Langton vs. Hughes, 1 M. & S., 593.

Cannon vs. Bryce, 3 B. & Ald., 179.

Hanauer vs. Doane, 12 Wall, 348.

Tracy vs. Talmage, 14 N. Y., 162.

In this present case the original illegal purpose was fully carried out and the contract completely executed. The lessor had completed the transfer of all its property; it had altogether abandoned its business and the operation of its service and had effectively disabled itself in that respect by transfer of its resources. Another corporation, the lessee, had, with its consent and by the procurement of the Railway Companies, taken its place upon their lines and in the performance of the service. It is conceded by the lessor and is held by the Court below (Rec., pp. 1127-1132-1195), that the lessor could not resume its business or recover its place on the railways, and that restoration of the original status, to any extent whatever, had become impossible. The contract was, therefore, completely executed. In such a case upon all authority the Court will refuse to interfere.

But it is not necessary that all the terms of an illegal contract should have been carried out to prevent a recovery of money or property passed under it. In *Kearley vs. Thomson*, 24 Q. B. Div. (1890), 742, in the Court of Appeal, FRY, *L. J.*, with the concurrence of Lord COLERIDGE, *C. J.*, said:

“ I hold, therefore, that where there has
 “ been a partial carrying into effect of an ille-
 “ gal purpose *in a substantial manner*, it is
 “ impossible, though there remains something
 “ not performed, that the money paid under
 “ that illegal contract can be recovered back.”

Sixth.

The Court erred in its determination of what constituted "the property" transferred under the lease of 1870, for which it held compensation must be made; and the value of the total capital stock, estimated by market price of certain shares, was no proper measure of value of such property.

This brings us to consideration of those assignments of error including Nos. 16 and 17, together with Nos. 11, 12, 13, 14, 26, 27 and 28, which, even if the cross complaint be held entitled to relief at all, and to relief in this forum and this proceeding, nevertheless, deny, for various reasons, the justice of the present decree.

The Court below has held that the cross-defendant is holden to make compensation for whatever property it received. We come, therefore, now to consideration of the conclusions of the Court as to *what that property was*, and as to the *measures of responsibility and of value* which it has adopted and decreed.

The property which purported to be assigned to the lessee consisted of three items, namely: (1) certain railway cars, (2) certain patent rights, and (3) certain operating contracts with railways.

The railway cars—nominally 119 in number, but really only 115, for four had previously been destroyed (Rec., p 1164)—together with a small sum of money composed the only items of *tangible* property.

These are relatively unimportant; for the cross-bill seeks to charge us, not merely with *property*, but with compensation in damages, as for an aggressive and wrongful breaking up of a settled business; and with compensation for all sorts of alleged

incorporeal and intangible rights, equities and possibilities, which, whether ever transferred to us or not, the cross-complainant claims to have lost and not to have recovered. All this measure of responsibility, legal or moral, we deny. We say, that whatever was done, was done by the Central Company alone, or with its concurrence and participation, and was its own doing quite as much as it was that of the cross-defendant; and was indeed more distinctively its own doing, because the illegality of its own acts occasioned its own loss and induced the consequences of which it complains. The defendant is no more in fault or answerable for these consequences than the complainant, and upon no legal principle can it be charged with this burden of indemnity.

The indications of the Court to the Master, as to the *corpus* of property for which it held compensation must be made, were far more comprehensive than a mere enumeration of these details of property. In the order of reference the Judge below said (Rec., p. 1127):

“ The Pullman Company took possession of the property *and business* transferred, consolidating it with its own, thereby creating one harmonious system of sleeping-car transportation that extended throughout the country. * * * Pullman cars and equipments have taken the place of the cars and equipments of the Central Transportation Company, and the *property and business* of the latter company are completely merged in the property and business of the former—as the parties, no doubt, contemplated they should be when executing the lease. The consolidation intended of the interests and prospects of the two companies could not otherwise be accomplished. * * * The property must, therefore, be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the

plaintiff and cannot be separated. Compensation must, therefore, be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value, the annual rental may be considered; but it does not afford a conclusive nor entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property, the business and its earnings, at the time they passed into plaintiff's hands and subsequently. It is not their value to the plaintiff we want, but to the defendant. In effect, *what it lost by parting with them.*"

Assuming to follow the indications of the Court, the claim presented by the cross-complainant before the Master was of a comprehensive sort, repudiating all details and inventories of specific property. It demanded indemnity from the Pullman Company for all that it claimed to have lost by making the lease, and by its own acts and defaults in pursuance of it. It insisted upon dealing with an aggregation called its "plant" or "going concern," comprehending all the *physical* property, and also all the *intangible* and *incorporeal* rights, equities, activities, powers, and business of the Central Company, except its mere corporate existence and capacity to receive revenue and distribute it to its stockholders, which being neither assigned nor assignable, should certainly enter into no estimate of value. Even this franchise *was ultimately included* in the valuation of property charged to the Pullman Company. All the rest, it insisted, *was transferred to and received by* the Pullman Company and *absorbed by*

it; and appraisal and recovery was demanded of the value of this *aggregate* which is called the "going concern." For example, it insisted that there should be included as property received, the *probability* of the Central Company being practically allowed to operate over roads with which it had no contracts, and the *probability* of continuance, *almost in perpetuity*, of the actual contracts with railways, because, expiring at different times, the operation of a system could not be interrupted by letting one or another drop out of a number of interlacing contracts. There were no contract rights of renewal. In this general mass, the cars were a concrete and tangible asset that could be scheduled, and of the patent rights a valuation was made; but this was done solely as a means or method of arriving at a general appraisal of the *value of the aggregate* above mentioned, called "the plant" of the Central Company, and the cross-complainant protested against a dealing by the Master *with any details of property*. It insisted upon a round appraisal of the assets, resources, equities and potentialities of the Central Company in 1870 taken together, and it insisted upon a finding that this general aggregate thus appraised constituted what was "*parted with*" by the Central Company and *received by* the Pullman Company.

This view was adopted by the Master, and under this conception as to what constituted the "property" transferred and "parted with" by the Central Company, he appraised the value of this totality as "a going concern" at a round gross sum. His construction of the order of reference, which has been approved by the Court, may be exhibited by certain passages of his report, viz.:

"X. The contracts assigned have been heretofore described. There is no separate appraisal or valuation of these contracts con-

tained in the evidence, and when their peculiar nature and varying terms of duration and different stipulations with regard to maintenance of cars and liability for casualties are considered, it is difficult to see how any such separate valuation could be made.

* * *

XII. Passing to the consideration of the main question raised in the present reference, viz., *what the Central Transportation Company lost* by the transfer of its property to the Pullman Company, the measure of damages as determined by the Court requires the Master to ascertain:

(1.) What was the value to the Central Transportation Company in 1870 of the property transferred?

* * * The order of reference as understood by the Master limits his authority to the ascertainment of *the extent or amount* of the property received and *its value when received*, together with its earnings since, less the amount paid as rent. General directions as to the course to be pursued by the master in arriving at the above valuation were stated by the Court in its opinion. *Whether* in connection with this valuation there *is to be a separate appraisal of each form of property transferred* or the appraisal of the *plant as a going concern*, is a question which is left open, and which, therefore, in the first instance, must be decided by the Master.

There is no estimate whatever given by any witness of the valuation of the contracts, nor can any such estimate be made by the Master from any evidence contained in the Record. There are estimates, as has been stated, of *the value of the cars as vehicles*, and also of *the value of the cars with the accumulated liabilities of the railroad companies*. There is testimony as to the *cost of the patents at the time of their transfer*, which is presumably their value at that time, and of *the value of the equipment and furniture of the cars*, and of *the amount of actual money turned over to*

the Pullman Company. There is evidence of the earning capacity of the Central Transportation Company at the time of its lease to the Pullman Company and for two subsequent years. There is evidence of the value of the stock of the Central Transportation Company in the market at the time of the transfer, and also of *the value of the plant as a going concern*. The latter is the *standard of value adopted by the Master*, partly because there is no testimony by which any other value can be arrived at, and partly because *if such testimony existed an accurate valuation of the property could not be reached by an addition of the separate values of the several forms of property, which taken together, constituted the plant in question.*

* * * * *

The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the Master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value. This amount has, according to the testimony, been placed at from \$56 to \$60 a share; and whilst the evidence as to these values is not as satisfactory as the Master would wish, it is, nevertheless uncontradicted. As between the two quotations above named, which indicate the fluctuations of the stock in value, the Master has taken the average, or, in other words, a valuation of \$58 a share. This, he believes, is as fair and equitable a valuation as is possible under the testimony, and he accordingly reports *the value of the property, when received*, is by him appraised at \$58 a share or \$2,552,000" (Rec., pp. 1170-7).

As this proceeding and valuation of the Master has been confirmed and adopted by the Court, a

summary of the valuation carried into the existing decree may be thus stated:

Estimated value of the entire assets, rights and resources of the Central Company in 1870 to itself, as a "going concern."	\$2,552,000 00
Value of tangible property, cars and equipment (Rec., pp. 1164, 1168. An average).....	\$711,673 25
Cash (Rec., p. 1169).....	17,000 00
	<hr/> 728,673 25

Leaving for value of the Central Company's contracts and equities and possibilities thereunder, the obsolete and useless patents, and other incorporeal elements represented in market value of all the shares of stock.	<hr/> \$1,823,326 75
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The cross-defendant is held accountable, therefore, not merely for specific and actual items of tangible property delivered and received, but for this vague and vaporous body of rights and chances which is called the "plant" or "business" of the cross-complainant, as if they represented a *solid and permanent property*, like the road-bed and equipment of the Pennsylvania Railway for example. It is said that this is what the cross-complainant "parted with" and lost by transfer, and, that consequently, it represents a *corpus* of property which the cross-defendant received and for which it is chargeable.

Attention ought to be given at this point, and before proceeding further, to the utterly groundless assumption that any "plant or business" of the

cross-complainant existed which had value arising from such substantial and permanent character or conditions. The entire pretense upon that subject is *fictional* to the last degree. Its only foundation, apart from the wretched outfit of obsolete cars and their equipment, was the sixteen contracts, chiefly with the roads of the Pennsylvania and Baltimore and Ohio systems. So far, from those contracts representing substantial and permanent relations, the truth was, that before, and at the time of the lease, the railways were so discontented with the service of the Transportation Co. that they were then studying how to rid themselves of the existing relations and put an end to the Central Transportation service on their lines. They found that the wretched equipment and inferior service was diverting the current of travel to competing railways, and the lease which was made between the Central and Pullman Cos. *had its origin with the railway companies*, and in a two-fold desire on their part, particularly on the part of the Pennsylvania Railroad Co. to *get rid* on the one hand of the Central Transportation Co.'s service, and on the other to secure the affirmative advantage of the Pullman Company's service, because of its distinguished superiority to any other in the country at that time, and because of its important railway connections and its control of travel from the Pacific coast and elsewhere. All this is fully established in the report of the Master, and in the testimony, a portion of which is given in the note below.*

* *Testimony of GEO. M. PULLMAN, Rec., p. 228:*

A. The Pennsylvania Railroad Company contract was the result of an application to me from the president of that company, and I assumed, and subsequent events have confirmed me in the opinion, that it was quite as much to the advantage of that company to have Pullman cars as it was to the Pullman Company to operate the line. The Pullman was then operating the Western lines, the Union Pacific, and it had a very large influence upon the travel, and the Pennsylvania Railroad officials were notified by their agents in California that if they wanted to secure California travel east from Chicago they must get Pullman cars; the people over there did not know any other cars. Mr. Scott, then president of the

We earnestly urge attention to the facts established by this testimony. They are strangely ignored and disregarded in the proceedings of the Court below, but are of the greatest importance to common jus-

company, called upon me subsequently and proposed to make a contract with the Pullman Company, provided we made some arrangements with the Central Transportation Company. Their cars, he said were not satisfactory, the business was not being done satisfactorily, and negotiation was commenced then in August, and was concluded, I think, in January following.

* * * * *
Testimony of EDWARD H. WILLIAMS, Gen'l Supt Penn. R. R. Co., Rec. pp. 665-6:

Q. I was calling your attention to the time while you were on the Pennsylvania Railroad, say from 1865 on continually down to about 1870, as to the adaptation of the service then operated on that road to the requirements of the Pennsylvania lines. How far was that service satisfactory to the management of the road or otherwise?

A. I do not know how far it was satisfactory to the management of the road, but our traveling men and the men in the passenger department, who had to do with the passengers, criticised the cars and the character of the service very much, and the matter was frequently spoken of about the necessity for an improved service upon the line.

Q. What was the ground and what the burden of their complaint?

A. The cars were not as comfortably arranged. There was a feeling sometimes, I must say, of insecurity as to the strength of the cars; they were not as thoroughly built as the other cars on the other lines, and in case of any little mishap there was more damage or injury than there would have been if they had been constructed properly. It is hard for me to tell; I cannot bring my mind exactly to the matter in such a way as to explain it clearly.

Q. Did you come to know of difficulty on the part of those agents in holding their own in the competition for travel on other lines?

A. In no other way than by what our traveling men would tell me. The men engaged in the passenger service sometimes would complain, not only to me but to Mr. Thompson and the officials here in my presence, of the necessity for improved service.

* * * * *
Testimony of FREDERICK KNOWLAND, General Eastern Freight Agent of the Missouri Pacific Ry. System in N. Y., Rec., pp. 679-80-81-82-83:

Q. In the course of your business, in your capacity as the general eastern agent of the Fort Wayne Railroad prior to 1869, and after that as the general western agent of the Pennsylvania lines, did you have occasion to observe and to know something of the sleeping car equipments operated by the Pennsylvania lines prior to 1870?

A. Yes, sir.

Q. Did you come to have a knowledge and acquaintance with the equipment of the Central Transportation Company on those lines prior to 1870?

A. Yes, sir.

tice in this cause, for they exhibit the fictitious nature of the so called "plant," to which such substantial character is wrongly given, and illustrate the extravagance of the valuation put upon it.

Q. Will you state what you know of the character and condition of that equipment and its suitability in 1869 and 1870, for the service required by the passenger business of those Pennsylvania lines? State fully and freely what you know upon that subject?

A. From the time that I took charge of the interests of the Fort Wayne road in the entire East—I had charge of the entire East—of course I had to compete with the New York Central and the New York, Lake Erie and Western from all eastern points clear up to Bangor, Maine. The greatest competition that I had, at least I felt it that way, was our sleeping-car service. * * * In order to compete successfully I had to pay much larger commission to ticket sellers for the business. I really, in a great many instances I paid \$1 more than was paid by the lines, the New York Central and Michigan Central, in order to meet the competition.

* * * * *

Q. As I understand, you mean to say that it cost you more to secure the business by reason of this equipment?

A. Yes, sir; I said frequently to Mr. McCullough and Mr. Scott both, that if I had proper sleeping car equipments it would save thousands of dollars, that I had to buy business.

Q. Who was Mr. McCullough, and who was Mr. Scott, of whom you speak?

A. Mr. McCullough was vice-president and general manager of the Pittsburgh, Fort Wayne and Chicago road and Cleveland and Pittsburgh. Mr. Thomas A. Scott was for a period of the time I was on the Fort Wayne road, was vice-president during Edgar Thomson's time, and after his death he became president of the Pennsylvania Railroad.

Q. Who was Edgar Thomson?

A. President of the Pennsylvania Railroad.

Q. What were the reports upon this subject of sleeping-car equipments which you say you made to Mr. Scott and to Mr. McCullough? I will ask you first with regard to Mr. McCullough.

Objected to by Mr. Prichard as immaterial and not evidence.

A. Mr. McCullough being my superior officer I was responsible to him to secure the traffic. I made frequent complaints to Mr. McCullough as to our sleeping-car service. It was not equal to that furnished by our competitors. Finally Mr. McCullough asked me to meet him in Philadelphia.

Q. What reason did you give? In what respect was it not equal?

Objected to by Mr. Prichard as immaterial and not evidence.

A. The cars were not up to the standard of the day; they were not equal in every respect with the cars furnished by the Erie and New York Central. Mr. McCullough telegraphed me to meet him here in Philadelphia and go with him to see Edgar Thomson and make a statement to Mr. Thomson. I done so.

There was, in fact, no such "plant" and no such value.

This Court, construing the lease, did not regard this intangible "property," namely, the con-

Q. With Mr. McCullough?

A. Yes, sir; Mr. McCullough was present. There was nothing done.

* * * * *

Q. State whether or not after Mr. Scott succeeded Mr. Thomson as president of the Pennsylvania road, the same questions arose?

Objected to by Mr. Prichard as immaterial and not evidence.

A. Yes. After Mr. Thomson's death Mr. McCullough and I came East on his special car here, and I brought the matter up in his car, and told him what disadvantages I was laboring under, and he says: "You had better not go on to New York, but come down and see Mr. Scott with me and make the same statement to Mr. Scott as you do to me."

Q. Did you do so?

A. Yes, sir.

Q. Tell what transpired?

Objected to by Mr. Prichard as immaterial and not evidence.

A. We stopped over and had breakfast in the car and we called on Mr. Scott, Colonel Scott, and I made the statement to him and he listened to me very attentively. He said: "Knowland, I will see Mr. Pullman and see if it is not possible to make an arrangement by which we can get the Pullman service on the Pennsylvania road." I was very much gratified to know that he was going to make an effort in that direction, and left for New York on the 1 o'clock train, I think.

Q. Was anything said of any difficulties in the way, or any question of arrangements that would have to be made for that purpose?

A. He said the Central Transportation Company had a contract, but he thought that there could be some amicable arrangement made, that he would see Mr. Pullman and probably some arrangement could be made by which Pullman would lease the Central Transportation Company, or he would get the cars on the road in some shape or other.

Q. Did you make any recommendations whatever as to what service should be put upon the Pennsylvania lines?

A. The Pullman cars were on all the Western lines, and that was another great disadvantage we labored under. All their employees worked right up to Chicago, and of course their influence all tended to place the passengers upon lines that run their cars in there.

* * * * *

Q. You may state what the reasons were which you assigned to Mr. Scott and Mr. McCullough in connection with your recommendation of a change of the service on the Pennsylvania lines?

Objected to by Mr. Prichard as immaterial and not evidence.

A. Because they were better equipped. I stated to him that they were more solidly built and gave better satisfaction in every way; that the service was much better; that is, in other words, the travel—what I looked

tracts and the rights under them, as constituting a permanent "plant"; for it dwelt upon and specified its perishable character as part of the very evidence which placed it beyond doubt that the consideration

at was the travel—all wanted to have a Pullman car; everybody wanted a Pullman car. If the line did not run a Pullman car there was a great drawback.

Testimony of JAS. D. LAYNG, vice president Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and general manager of the West Shore Railroad (Rec., p. 693).

Q. You were connected with the Pittsburgh and Fort Wayne Railroad were you not, in 1869 and '70?

A. I was.

Q. What was your relation to that road; in what official capacity?

A. I was from 1865 until 1871 superintendent of the Eastern Division, from 1871 until 1874 assistant general manager, and from 1874 until 1881 general manager.

Q. You were acquainted with the sleeping-car equipment of the Central Transportation Company that was operated upon the Pennsylvania lines during the year 1869 and down to the year 1870?

A. I was.

Q. You were on the road at the time of the transfer of the administration of that sleeping car service from the Central Transportation Company to the Pullman Company?

A. I was.

Q. Do you know what the conditions and circumstances were which led to and caused that change to be made; if so, kindly state all you know?

Objected to as immaterial.

A. The equipment in use by the Central Transportation Company was of a very inferior kind, with the exception of a limited number of cars which had been placed upon the line new from time to time, the larger portion being of the old style of cars that had grown up with the establishment of a sleeping car service.

Q. Well, this equipment being then such as you have described, what was the purpose sought to be accomplished by the change in administration of that service which was made at that time?

Objected to because it is not shown that witness had anything to do with that change and because it is immaterial.

A. Being in the general office and in constant communication with the general manager of the Pennsylvania Company's lines, Mr. J. N. McCullough, I had repeated conversations with him, advising him from time to time of the bad service and the low grade of sleeping cars and was probably as near to him as any other officer of the system. He kept me advised from time to time of his intention to make a contract with the Pullman Company if he could, so that, while not a direct party to the negotiations, I was constantly advised of the arrangements as they progressed.

* * * * *

reserved in the lease was *not paid for property*, but for the unlawful covenant of the lessor and its abandonment of its business.

Moreover, it is plain, from the terms of the lease

Testimony of A. J. CASSATT (Rec., pp. 703-4-6-8-716).

A. I was connected with the Pennsylvania Railroad from 1861 to 1883. I entered the service as assistant engineer in the engineering department and served in the various grades of service. I was resident engineer and division superintendent and superintendent of motive power and general superintendent and general manager and vice-president.

Q. What was your connection in 1869 and in 1870?

A. I was superintendent of motive power during 1869, and I was made general superintendent in 1870, I think.

Q. Were you acquainted with the sleeping-car service operated on that road by the Central Transportation Company prior to 1870?

A. Yes, sir.

Q. Did you have knowledge of the change that was made in the administration of that service when the Central Transportation Company was succeeded by the Pullman Company?

A. Yes, sir.

Q. State what the consideration and conditions were which caused that change to be made.

A. It grew out of dissatisfaction with the cars and the service of the Central Transportation Company and a desire to improve it. * * *

Q. Why did the Pennsylvania lines wish to get rid of those cars?

A. Because they were not considered equal to the cars furnished on other roads. They were not equal to the cars furnished and running on the Erie road, or they were not considered equal to the Pullman cars which were running on roads west of Chicago and one or two of the roads east of Chicago. It was found that they were generally not satisfactory to the public or to the railroad company. We felt it in our passenger business, showing the necessity for better cars.

Q. State whether, if any, what representations were made to you or the other officers of the Pennsylvania Railroad Company upon that subject by any of the men connected with the traveling department, the passenger agents, and so on, of the road, and whether or not such representations influenced the Pennsylvania Railroad on that subject.

Objected to as incompetent evidence.

A. There was a complaint by the passenger agents and the men whose business it was to solicit and manage the passenger business of those cars. I cannot specify the occasions, but it was a general feeling in the service that the cars were not satisfactory and not up to the requirements, and that we were losing business on that account.

Q. Do you know what the feeling was and whether representations of that character were made by the officers of the Pittsburgh, Fort Wayne, and Chicago Railway Company?

Objected to for the same reason.

A. I knew that Mr. McCullough, who was the vice-president in charge

itself, that *the parties* thereto had no such conception of the substantial character and permanence of the "plant" represented by these contracts as has found expression and pretense in the claims ad-

of the Fort Wayne road, was very decided in his complaints about the condition of the sleeping car equipment. His views led largely to the making of the contract with the Pullman Company.

Q. What did he want?

Same objection.

A. He wanted Pullman cars.

* * * * *

Q. State, as near as you can remember, how soon the old Central Transportation equipment commenced to be superseded and put out of service on the Pennsylvania Railroad lines after the contract made with the Pullman Company, and how rapidly that process proceeded?

A. The process commenced at once after the signing of the contract, and went forward as rapidly as practicable until all the Central Transportation cars had been put out of service and replaced by Pullman cars. I cannot say from memory exactly how long that took. Several years.

Q. Why did they commence immediately to put the Central Transportation cars out of the service?

A. Because the subject of making the contract was to have Pullman cars introduced upon the road and improve the service.

Q. You say that was the object of making the contract. What contract do you mean?

A. I mean the contract between the Pullman Company and the Pennsylvania Railroad Company.

* * * * *

Q. Mr. Johnson inquired of you relatively to the importance to the Pullman Company of getting upon the through lines to the coast from Chicago and to operate such a line as well as the lines west of Chicago. State what you say with reference to how far it was considered important to the Pennsylvania Railroad to get upon the Pennsylvania Railroad the relations of the Pullman Company to the Western traffic west of Chicago?

A. That had a very considerable influence in the making of the contract at that time.

Q. So that the contract with the Pullman Company was regarded as being reciprocally important, not only for the Pullman Company to come to the coast, but for the sake of the Pullman relations to the travel west, which might be sent over the Pennsylvania lines?

A. Yes, sir; the Pullman Company had its cars on the majority of roads; in fact, I think all but one leading west from Chicago, and they could influence the direction of that travel east of Chicago very materially, and that had much to do with making the contract with them, and still more to do with the renewal of the contract in 1885.

* * * * *

The facts shown by this testimony have been confirmed and established in the *Report of the Master* (Rec., pp. 1139-40-81).

vanced under this cross-bill. When that section "EIGHTH," which received the consideration and construction of this Court, in the case of *Pullman Company vs. Central Transportation Company*, 139 U. S., 65-66, was introduced into the lease, it proved *the understanding of the parties* that those railway contracts were of a precarious and unstable nature, and that they were severally liable at any time to fall out altogether, and that the revenue under the lease would be largely reduced. It was but an ordinary precaution, therefore, in the understanding of the parties then, that the lease should, in its terms, provide for such extinction of contracts, and that the *rental* to be paid under the lease should be thereupon diminished. There was no such conception then of this "plant" in the minds of the parties, as developed afterwards, in the minds of counsel and of the Court, under this cross-bill, after all the contracts had, in fact, ceased to exist.

Nevertheless, the cross-defendant is held responsible for indemnity as if it had *aggressively and tortiously* seized upon and appropriated and wrongfully destroyed a permanent and established business of the cross-complainant *without any fault or concurrence of its own*. Of course the cross defendant denies that it ever became lawfully amenable to any such measure of responsibility.

Assuming, however, for the purposes of this argument, that the cross-complainant may recover the value of such property as was actually transferred by it to the cross-defendant under and for the purposes of this lease, we may consider how much of what it has been charged with by the Court may be admitted to have been so transferred and received by the cross-defendant; for so much as is thus admitted may be eliminated from the discussion which we may confine to the residue. It may be admitted that we received all the property which was *susceptible of manual transfer and physical delivery*, and which was *actually so transferred* and delivered. That includes the cars and their equipment, and also in-

cludes the sum of \$17,000 in money. These items may be conceded, with the single exception that we think the valuation of the cars and equipment is somewhat higher than it should be.

Such suggestions as we care to make upon the subject of the patent rights assigned may be best made here. Those patents have been valued at \$266,000 (Rec. p. 1169), and the amount of the decree is increased by that sum; but it was error to allow anything for them. They were never used, and had absolutely *no* value except so far as they gave superfluous protection to the use of the railway cars which had already been built under them. That value, whatever it may have been, was *included in the valuation placed upon the cars themselves*. In the Master's report is the following statement:

"No revenue appears to have been derived from the use of these patents, and they have long since run out. The only use to which they were put by the Pullman Company was in connection with the old Central Transportation Company's cars and equipment."

We may concede, then, with the money, a manual transfer of the cars and equipment. As to every other element of the so-called "property" which has entered into the aggregate of this decree, we deny that we have ever *received* it, or *used* it, or that we can be made *lawfully* chargeable for it; and insist that the decree is excessive and erroneous by the total amount of whatever is included therein on account of such "property."

(a.) It seems perfectly obvious that this body of so called "property" which the cross-defendant is held by this decree to have received, and for which it is held accountable at a valuation equal to the total market value in 1870 of all the shares of capital stock of the Central Company, and which is measured in value by that standard on the ground that it included all the elements of value *represented*

by that total capital stock, was never transferred by the cross-complainant nor received by the cross-defendant. The judgment of the Court below as to what constituted "the property" transferred, and the foundation of the decree are in this respect fictitious in fact and in law.

No contracts, or property represented by contracts, or other *incorporeal* rights, were or could be transferred to the Pullman Company by any act of the Central Company; for such transfer of incorporeal property is effected only *by operation of law*, and the law can never thus *give effect* to what the *law prohibits*.

The contract of lease and its assignments were void and ineffective for any purpose. This Court said of the lease. It "is not voidable only but wholly void and *of no legal effect*. The objection to the contract is not merely that the corporation *ought not* to have *made* it, but that they *could not make it*" (139 U. S., 59).

So the objection to these acts of *assignment* of contract is not that the company *ought not* to have done them, but that it *did not do* them, for it *could not do them*. The Court below seeks to avoid any *apparent* direct enforcement of the undertakings of the lease. The obligations relied upon here are said to arise *by implication of law* from the lessor's *acts of actual delivery*, and from the *possession and use* by the lessee of property which was the subject matter of the void contract. But inevitably these obligations are *measured by the legal effect* of the attempted transfer and by the *extent* of such *possession and use*.

Now, the contract of lease and the assignments of contracts being *void* gave *no possession or use* of any such property, and *transferred no rights*. They were inoperative so that the Pullman Company derived nothing *through them creating either rights or duties*. That is the principle declared by this Court in the words above cited.

Accordingly, it is said that although the lease and

assignments were void and of their own force carried nothing, the Pullman Company nevertheless *actually* acquired the contracts with their rights and powers, and entered *practically* (however that may be explained) into the use and exercise of the *rights* of the Central Company under them; and that it appropriated and absorbed those rights and powers and thereby extinguished and destroyed them.

But, clearly, that is not so. It has never appropriated or absorbed, or exercised or received any of these contract *rights*. They never passed to the Pullman Company from the Central Company, in practical fact or in legal effect. Whatever may have become of them and whatever may have been their status, whether they remained dormant and in abeyance, or were neglected and abandoned by the Central Company, *they never came to* the Pullman Company, and were never exercised or used by it. Clearly they could not be so exercised or used. The Pullman Company was to be found upon the lines of the railways; that is true, but *it was not there by force of any authority existing in or executed by* the Central Company, nor was it there *in the exercise of any rights transferred by it*. The claim is that, in that position on the railways, the Pullman Company exercised, and used up the powers of the Central Company under its railway contracts. The claim is grounded upon and confined to an asserted practical transfer, possession and use of *incorporeal rights* analogous to the possession and use of *physical personal property*, such as the railway cars which were used, and used up. The claim can of course exist only *within the analogies* of such physical property used, and destroyed in the using.

But, under the guise of following this analogy, the case is carried far beyond the boundary of all possible analogies. Of physical property there may be an actual, effective, *manual transfer by act of the parties*, though it be in *violation of law*; but *incorporeal rights* depend upon *operation of law* for their transfer, and no analogy exists. Where the con-

tract is unlawful and void, therefore, there can, apart from it, be no effectual transfer of these, practical or otherwise; for such transfer cannot occur except by the operation of law, and the law will not operate to make effective *what the law prohibits*. The argument which finds and fixes a liability for *physical property manually transferred* and used up, falls dead when it reaches incorporeal contract rights of which there can be *no manual transfer*, nor any transfer except by the *operation of the law itself*. This is clearly enough true, even of *natural persons*, who do not derive their *existence* from the law, but whose rights and obligations are governed and regulated by law. It is *a fortiori* true of a corporation, a purely *juristic person*, which derives its existence as well as its rights and obligations *from the operation of law*, and, of which, "its charter is its law of nature." To such a person everything is *impossible* which is *out of conformity* with law. All analogies fail, therefore, unless we were clothed by the effect and *operation of law* with the rights represented by the assigned contracts. That being *impossible* we received nothing from and have used nothing *under the assignor*. No obligation to compensation and indemnity can arise *by implication of law* from possession and use of property, when no such possession or use was possible, but, on the contrary, was made *impossible* by the *inhibition* of the very law which is invoked to give rise to such an obligation.

This is not a case where act of the parties alone effected a transfer of these rights and clothed the cross-defendant with their possession and use, *subject merely* to the plain legal duty of the cross-complainant to *reassert the rights* and to *resume* its property and the performance of its corporate duties (*Thomas vs. Railway Co.*, 104 U. S., 101). The *rights* never passed at all. The Pullman Company never acquired them, and it never acted under or used them. As we have already said, only the *operation of law* could make effectual a transfer out

of which the implied obligations asserted by this decree could arise; but "*the law never implies an obligation to do that which it forbids the party to agree to do.*"

FIELD, Ch. J., in *Zottman vs. San Francisco*, 20 Cal., 96.

The lease under and in pursuance of which this alleged transfer was made was held to be void, in distinct recognition by this Court of this very principle. This Court, in its opinion, 139 U. S., 59, said:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is *not voidable only, but wholly void and of no legal effect*. The objection to the contract is not merely that the corporation ought not to have made it, *but that it could not make it.*"

This principle is stated again in *Jacksonville, &c., Ry. Co. v. Hooper*, 160 U. S., 514-524-530. In *Cal. Bank v. Kennedy*, 167 U. S., 368, 371, also this Court held that by an illegal purchase of stock the bank *did not become a stockholder*, and so the *liabilities* of a stockholder *did not attach to it* (see page 113 *post*). And this Court cited with approval the case of *ex parte Liquidators*, L. R., 8 Ch. Div., 370, where in a like situation it was held that the party "*had never in fact become a shareholder.*"

These are no mere abstractions of philosophy, but a substantial ground of practical relations. Old, settled principles of the civil law, they are also familiar principles of our common law and equity. The livery of seisin of incorporeal things was not *necessary* because it was *impossible*. They are inherent elements in every code of logical and civilized law. A classic mode of removing Gordian difficulties might commend itself to the Court below for con-

venience and simplicity. A stroke of arbitrary power may remove an obstacle that justice and reason refuse to disengage; and the practical effectiveness of a *dictum* may avoid the inconvenience of finding a reason. The considerations above advanced are disposed of with facility by the Court below, as follows:

“The argument drawn from the invalidity of the lease, that this instrument did not transfer this description of property, seems to be fallacious. The lease did not transfer any description of property. It was ineffectual for every purpose. The *acts of the parties*, however, *transferred* the property, the *intangible as fully and effectually as all other*. * * * The *obvious answer* is that the Pullman Company *got* the use and benefit of these contracts *as completely as it did that of all other* property named in the lease. * * * The lease under which the parties acted was void, but this *did not render the acts void*.”

But whether this Macedonian method is the approved method of modern courts of equity is perhaps one of the questions which this record presents. As above shown, the Court below said: “The *acts of the parties*, however, *transferred* the property, the *intangible as fully and effectively as all other*. * * * The lease under which the parties acted was void, but this did not render *the acts void*.” But we submit that the considerations which made the lease void, made the attempted acts *impossible*. They were ineffective, and transferred nothing. This Court, as we have already shown (p. 97, *ante*), says that the objection to an *ultra vires* contract is *not* that the corporation *ought not* to have made it, but that it *could not* make it. These attempted acts of assignment were such as the corporation not only ought not to have done, but *could not do*; and surely what it *could not do it did not do*.

What, then, was *possible*, whether lawful or not, on the part of the Central Company in 1870? Simply

this: It could cease from the conduct of its business of transportation; it could abstain from and abandon the exercise of its rights under its railway contracts; it could abandon the lines of the railways; it could lie dormant as to its own activities, and suffer the railways and other persons, without opposition, to make such new arrangements as they chose. It could *covenant* to do all these things, and *could do* them. But it could not *keep* a covenant to *assign* all its contract rights, for the covenant being *void*, the assignment would be *ineffective* and the rights *would not pass*. It could not *transfer* its contract rights and *bind the railways by that void transfer*. It could not, *of its own force*, put another party upon the lines of the railways and *enable it to operate a service there*. In the actual case *it could not put*, as it is assumed to have done, the Pullman Company *into its own position under its contracts* on the railways, for that it had neither the right nor the power to do. If the railway companies had refused to admit us, we could not have gone upon the lines. If, being there, the railway companies had been inclined to put us off, the Central Company *could not have maintained us there*. Neither its contracts nor their assignment, nor any thing whatever which we received or derived from the Central Company, established us in any right on the lines, or confirmed or maintained our position there for an hour. The Central Company withdrew in legal effect from the lines and *abandoned the service*, that is true; but it could not, of itself, put the Pullman Company into position there, and *it did not*. But what the Central Company could not give it, the Pullman Company *received from the railway companies*, and accepted at their solicitation. The presence of the Pullman Company on the lines of railway grew out of the desire of those railways to obtain the Pullman connections and service, and was the result of the affirmative intervention and procurement of the railway companies. This ought not to be overlooked, for it has been *established* by un-

contradicted testimony in the record, and the Master has been *constrained to so find and to report that fact* (Rec., pp. 1130-40).

The *lease*, therefore, was ineffectual to pass any title or right whatever, to *any sort* of property, and the same is equally true of the various *assignments of the contracts* which were a part of the same transaction. The result is that no such *corpus* of property was ever in legal effect transferred by the Central Company or received by the Pullman Company. No railway contracts *valid and obligatory in favor of the Pullman Company upon the railways* during the original or the extended life of the Central Company, or during the continuance of any patent rights, original or extended, or *for any other period whatever, were ever received* by the Pullman Company. The Central Company had *definite contract rights* for fixed and long periods of time and enforceable against the railway companies. The Pullman Company *did not acquire* those, and the Central Company *did not "part with"* them. The Pullman Company *got nothing enforceable upon the railways* either specifically or by damages. It acquired at best but a *precarious status, terminable and destructible at any moment* by the Central Company itself or by the State. The attempted assignments passed no title, and *no legal rights*. Now that was *not open* below to argument, for it had been *adjudged* between these parties. Whatever conclusion the Court arrived at it should have been one consistent with this situation. *These contracts were never binding upon the railways on behalf of the Pullman Company for any period of time whatever*. There was never a moment when the Central Company might not have repudiated all that it had done or agreed to do. It might at any time have resumed its cars and business, and it might have insisted, as against the railway companies, upon all rights which it had under its contracts; nor could the Pullman Company have had any remedy or redress. And in the light of the opinion of this Court

it was always its legal *duty* thus to reassert and resume its rights.

There was never a moment when the entire transaction might not have been disaffirmed and set aside by the Central Company or by the railway companies either or any of them, and also by the State on the intervention of its officers. So the Pullman Company *did not succeed to the rights* which the Central Transportation Company had. *It did not, by any act of the Central Company, acquire an equivalent position.* The Pullman Company as assignee *could not have enforced a right under any of these contracts.* It is true that some of them in terms ran between the several railways and the Central Company and its assigns; but that means assigns under a lawful assignment, and this assignment has been held to be an unlawful one and void. It was doubtless such an act as would have enabled the several railways, had they been hostile to it, to rescind the several contracts altogether. In any event, it is *certain that no railway was bound to the Pullman Company by force of anything done by the Central Company; and the Pullman Company acquired nothing and could enforce nothing against anybody under the assignment.*

The *consideration that induced* the assent of the railway companies to the entry of the Pullman Company service upon their lines was, therefore, a consideration *that emanated from and belonged to the Pullman Company.* It was, if we may speak of "property" as the cross-complainant does, *the property of the Pullman Company*, and not an element derived from the Central Company at all. So the Master has found and reported (Rec., 1181). The Central Company gave to the Pullman Company neither the right nor the permission.

Now, it is obvious that neither what the Pullman Company actually received nor what the Central Transportation Company could actually transfer *has ever been the subject of valuation by anybody.* The Court held the Pullman Company account-

able for, and directed the Master to inquire into the value of, something *altogether different*. There has been a valuation of what the Central Company *itself had* in 1870, and which may have been represented *to it* by the value of its capital stock; but it was error in the Court below to hold that the Central Company "parted with" that to the Pullman Company; and of what the Pullman Company *actually received*, in fact and in law, there *has never been any valuation* whatever either *directed or made*. What has been *appraised* the Pullman Company *never got*; and *what it got* by act of the Central Company, has *never been appraised at all*. The value of the actual *status* acquired by the Pullman Company was not what witnesses appraised before the Master, nor what was represented by the market value of the entire stock, nor was it "the going concern" which has been valued and with which we are charged by this decree. Who, in this record, has given testimony that the precarious *status* that could be acquired through the acts of the Central Company was worth in 1870 the amount that has been awarded by the decree? Where is the evidence in this record that *not* what the Central Company *itself had*, but *what it could sell*, and "part with" by this transfer, was worth the sum appraised by the Master? Who has testified that the value in the market of what the Central Company *actually could have* "parted with" to the Pullman Company *would be measured by the market value* of the entire stock of the Central Company? Who has testified that in 1870 *any one would have paid* the amount of this appraisal *for such an assignment* with the right and *duty* of sudden cancellation and termination by the Central Company itself, or by the State, and *with no obligation on the railways to substitute the assignee or assurance that they would do so*? Who would have agreed at the same time to pay the amount of this appraisal, and *also to pay* the Central Company *all the net earnings that might be made during such time as the*

possession should remain undisturbed? The very suggestion seems to illustrate the anomolous and monstrous character of the decree to which the appellant has been subjected. There is *no testimony* on that subject in the record, and there is *no appraisal by the Master* of such value.

That the Central Company ceased the conduct of its business of transportation and withdrew from the lines of the railways and interposed no obstacle or opposition, while the Pullman Company by arrangement with the railway companies substituted its service upon their lines, may be entirely true; but *this brings us directly to the inevitable conclusion* that the Central Company could not make its mere withdrawal from the railway lines and abandonment of its business and the neglect to interpose opposition *a basis of recovery of compensation therefor*. That was not property. The power to lie thus dormant and inert cannot be deemed part of "the plant." What difference can there be in point of illegality between the Central Company's *refraining from doing* its public duty and conducting its corporate business, and allowing instead another to perform the public service and to absorb that business, and an *express agreement* to do that very thing? It is the *doing* of the thing which is unlawful, and which *makes the covenant* to do it void and *unlawful*. The Court cannot aid it to do indirectly what it could not lawfully do directly. A contract to do that very thing would be void and unenforceable, because unlawful; but it would be unlawful, because the doing of the thing would itself be unlawful. *There can be no recovery of compensation, therefore, for the doing it*, any more than upon an *express contract to do it*. It represents in no sense "property" or a *right transferred*. The decree, therefore, not only charges the Pullman Company with compensation for so-called "property" which it never received from the Central Company, and which that company never parted with, but it *includes compensation* for that same

illegal element for which this Court has expressly declared compensation cannot be allowed. That all this is inevitably included by the decree is obvious, because the estimate is general of the *value of a transfer of the entire property* and resources of the Central Company, and is determined by the market value of its entire capital stock. It comprehended everything corporeal and incorporeal which went to make up the total resources of the Central Company's "plant" as a "going concern," including that *act of complete divestiture* of itself of all its corporate property and resources *which disabled it* from conducting its business and discharging its corporate duties, and for which we *agreed* to pay and did pay "rent."

(b.) For another clear reason the contracts (and the patents also) should have been excluded from the valuation adopted and embodied in the decree, and it was error not so to exclude them.

This decree, under the theory upon which it is based, gives all the *earnings* derived from the use of the so-called "property" of the cross complainant transferred under the lease, and *includes the railway contracts* in the body of property so held to have been transferred, and consequently a *capitalized valuation of those contracts* is included in the amount of the decree.

It seems very plain that such a capitalized valuation of those contracts cannot justly be given by the decree if the earnings made under the authority of them are also given, because in their analysis the contracts represented merely *a right to make those earnings* and were *exhausted in making* them, and would inevitably, by mere lapse of time, presently cease to exist.

The *value* of a terminable contract itself and the *earnings* under that contract, namely, made by authority of it, are *not two* separate things. They are one. When any earnings are made under the authority it confers, the contract is *pro tanto* gone.

Day by day also it diminishes and expires. The *abstract* value of a *contract* is simply the value of the earnings *not yet made*. A capitalized valuation of the *contract* is a capitalized valuation of the earnings to be made. The earnings and the contract are the same thing, for the contract is but *the opportunity to make the earnings*. To capitalize the contracts as of an independent value, and then give the earnings, the *making of which must consume the contract*, even in the hands of the Central Company itself, is to give them *twice*. If the Central Company had itself made the earnings, the contracts would equally be exhausted and gone. And the contracts would have equally expired and gone out of existence whether used and availed of by any one or not. When the cross-complainant gets the earnings made under its contracts *it gets all* that in the nature of the case *it could ever have had* from those contracts *if it had never parted* with them at all. From the very nature of the case they have in the earnings everything out of this property which they could have had *if they had kept it all in their own hands*. When they have gotten the earnings there is a complete restoration of the *status quo*. In whatever form one gets *the product of the use* of these contracts, that product represents the contracts in their entirety. The contracts themselves were exhausted in producing this product. Why, then, should that company have all the earnings made under the contracts, and also a capitalized valuation of the contracts themselves as of 1870, as if those contracts were permanent property; as if, for example, they were land or a railway road-bed that would remain unimpaired for the making of further earnings?

By the hypothesis of the decree, if the cross-defendant received the property it did so *only for the use of* the cross-complainant (Rec., p. 1196); and so it applied and expended the property, in getting the earnings which it accounts for, *precisely as that property must have been applied and expended by*

the cross-complainant itself in exercise of the same contract right to make earnings.

(c.) It is plain that the Pullman Company is charged with the value, *as property*, of what it never received, because it is charged with all value of any sort represented by the aggregate value of all the shares of capital stock of the Central Company. The ownership of *all* the shares of the capital stock, however, would carry with it *all the franchises* of that corporation, and the total value of the capital stock includes the value of the franchises as much as of any other asset of the corporation, and this value is, therefore, by the decree charged to the Pullman Company. The right to be, and to continue to be a corporation, and as such to receive all lawful revenue and to distribute it, was to the shareholders one of the most important and valuable franchises and assets of the Central Company, as it is of any corporation; for every corporation includes its franchise among its assets represented by its capital stock. But it was not assignable, and was never "parted with" by the Central Company. Nevertheless it was included by the Court in the aggregate upon which it based its decree, though the shareholders of the Central Company retained all their capital stock and with it this franchise. The Court disposes of this with facility, and says (Rec., p. 1195):

"The assertion that the valuation includes
 "the value of the transportation company's
 "franchise is *not well founded*. It is true
 "that the property is valued at its worth to
 "*the latter* company, in view of the right to
 "use it as the company did. *This right* the
 "Pullman Company *could exercise* by virtue
 "of *its* franchise, and *did not therefore need*
 "the Transportation Company's."

Why, on the other hand, then, should it *pay for it*? Neither did the Transportation Company "part with" it, nor the Pullman Company acquire it.

Nevertheless, it is charged with its value, and that value is included in the decree, against which no credits are allowed and upon which more than ten years' interest is accumulated. If the Pullman Company did not "*need*" it and the Central Company did not "*part with*" it, it is error incontestably to include the value of it in this decree.

And *manifestly the value of this franchise was very considerable*. Practically it represents this decree. For this same franchise which was thus reserved to the Central Company and not "*parted with*" has enabled that company *to appropriate the \$3,960,000* which we have paid it. It preserved to that company also the right at all times to repudiate and set aside this lease, which was illegal and void because in violation of public policy. In retaining this franchise it retained, moreover, what has *enabled it to bring this suit and obtain this decree*. If this decree is proper, and the amount of it be added to the sums we have already paid, it is plain the value of that franchise in 1870, for which we are charged in the capitalization, was something appreciable. If we had actually in 1870 purchased every share of the capital stock of that company, with the total value of which we are now charged, *we should never have had occasion to pay those millions* to the Central Company, nor would it have been able to bring this suit and expose us to this unmitigated pillage; all of which is proof conclusive that there never was transferred to the Pullman Company *all* that was represented by the total value of all the shares of capital stock; and that, perhaps, the Court below was *mistaken* in what it said, and that in fact the Pullman Company, dealing with the Central Company, *did "need"* that franchise, which it is required to pay for.

The Court, therefore, treats as "*property parted with*" by the Transportation Company and received by the Pullman Company, elements which were not proper to be accounted as "*property*" at all in making up the decree.

(d). The Court treats as property taken possession of and destroyed by the cross defendant, the *business* of the Central Company, and charges the Pullman Company with its value in the decree, because it was "lost" by the Central Company through the proceedings under the lease. It was not "property transferred," and for other reasons no right of indemnity such as is claimed can exist here. The decree is erroneous because it awards compensation to the cross-complainant for what it lost, if at all, by its own neglect and the breach of its own legal duty. The lease being void, and all the acts of the Central Company under it illegal, it was its duty at all times to re-assert its rights, and to resume the possession of its property and the performance of its corporate duties. (*Thomas v. Railway Co.*, 104 U. S., 101). Its passivity and acquiescence in the situation were equally illegal with the lease itself. It has no right to indemnity or compensation for its own defaults. The rule is well settled that a party cannot recover for injury which it was in his own power to prevent, but which he nevertheless suffered and permitted.

In Sedgwick on the Measure of Damages, Sections 201 and 202, it is said:

"The same principle which refuses to take into consideration any but the direct consequence of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them. * * *

It is frequently said that it is the *duty* of the plaintiff to reduce the damage as far as possible. It is *more correct* to say that *by consequences which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged*. Such consequences can hardly be the direct or natural consequences of the defendant's wrong, *since it is at the plaintiff's option to suffer them*. They are really excluded from the recovery as *remote*. In this view the doctrine would rest on the intervention of the *plaintiff's will* as an inde-

pendent cause. *Ad hoc* he is not damaged by the defendant's act, but by his own negligence or indifference to consequences."

So in *Loker vs. Damon*, 17 Pickering (Mass.), 288, SHAW, Chief Justice, said:

"Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner see the gate open and passes it frequently, and willfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his *own* folly. So if one throws a stone and breaks a window, the cost of repairing the window is the ordinary measure of damages. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in, and rots the window, this damage would be too remote."

Dodd v. Jones, 137 Mass., 323.

United States v. Smith, 94 U. S., 218.

If the business of the cross-defendant has suffered, it is its own fault. If its cars have become dilapidated, it is its own fault. It could at any time have taken and given them all possible protection. They have been offered, and it has refused to receive them. We have asked the Court for a receiver of them, and for their sale, but this, too, has been refused under the objection of the cross-complainant. In *Bartley v. Grove et al.*, 21 W. N. C., 204, in an action for rental value of a store, real estate which the defendants had occupied with some machinery, &c., it was claimed they had destroyed the property and that it had become dilapidated, and the Supreme Court of Pennsylvania said:

"The plaintiffs cannot recover the *loss of the capital value* of the property; they cannot recover anything for the *dilapidation or destruction* of it, for they might have kept it up."

Of course, the only relation between these parties was such as was produced by whatever *actual* transfer and delivery of property occurred for the purposes of the contract of lease. Now, such *act* of transfer and *actual delivery* was, so far as it was possible for it to occur, *the thing in which*, as has been already stated, the illegality *inhered*, and which made the lease void because it was a contract to do it. Such actual transfer (assuming it for the sake of the argument to have occurred), being legally inhibited and void, could create no *fiduciary* relation, nor any relation out of which *contracts* could be *implied* for an *unlawful use* of the property for benefit of the assignor.*

The proposition of the Court below that the Pullman Company took possession and held and used the contracts or property for the Central Company up to 1885 is in the teeth of the judgment of this Court. It is as this Court held in *California Bank v. Kennedy*, "but a *reiteration* of the contention that" the attempt to assign the contracts and property "under the circumstances disclosed was *not void, but merely voidable*." This Court said: "It would be a *contradiction in terms* to assert that there was a total *want of power to assume the liability*, and yet to say that by a particular act the liability resulted."

Cal. Bk. v. Kennedy, 167 U. S., 371.

Nor could contract be *implied* for indemnity to the assignor for an interruption, *to which it consented*, of business which it unlawfully aban-

* But this is precisely what the learned Judge below says *did* occur. He says, Record, p. 1196: "The ownership of the property remained in the Transportation Company, the Pullman Company *TAKING POSSESSION AND HOLDING IT FOR THE FORMER*, paying a stipulated price for its use up to 1885." If that is not a *trust* for the *performance* of the void leases, until disaffirmed, what is it? And if the Pullman Company *was holding* the property *for the use* of the Central Company, why should it pay "a stipulated price for the use?" And if it was "paying a stipulated price for the use, why must it account for the earnings? How could the amount of the earnings become *material at all*?"

done. It was at all times the duty of the Central Company to resume its property and its business. It cannot, consistently with any legal principle, recover compensation for losses which it passively permitted to occur, which it was within its own power to prevent, and which it was its legal duty to prevent. Throughout this cause the Court below has taken for its basis the assumption that the Pullman Company has been in all transactions between the parties *an aggressive wrongdoer*, appropriating property *in invitum* and destroying the business of the Central Company, while that company was *not even in pari delicto*. The decision of this Court *prohibits* such an assumption as this. The Pullman Company has *received* nothing, and has *done nothing*, except by the consent and participation of the Central Company; and it was *that participation* which was held unlawful. There is here, therefore, a fundamental error, which runs through all the rulings of the Court below and undermines all the principles and computations invoked for its decree.

At the risk of some repetition we venture to restate what we believe to be the law which governs this situation. The rule that the cross-complainant cannot recover for damages which it might have avoided, and which it was its legal duty, and, in the language of the authorities, its *social* duty to avoid, is made insuperable here (*Miller vs. Mariners' Church*, 7 Me., 51), by the fact that, so far as the business of the Central Company can be said to have been broken up at all, that result has occurred, not by the fault of the Pullman Company, but with the co operation and participation of the Central Company itself. No indemnity can in such case be asserted against the cross-defendant on the basis of *fiduciary* obligation, for no fiduciary relation could arise out of the *mere* possession and use, if any such there was of property *not already impressed with a trust*, even though that possession and use were tortious

(*Root v. Railway Company*, 105 U. S., 215; *Monk v. Harper*, 3 Edw. Ch., 111; *Doyle v. Murphy*, 22 Ill., 508; *Wilson v. Kirby*, 88 Ill., 572). But even if that were otherwise, the concurrence and participation of the *cestui que trust* itself would eliminate all equity from any claim of indemnity it might assert.

If the business of the Central Transportation Company was destroyed, the Pullman Company was no more chargeable with that result than the Central Company itself. The Central Company was a participant, *at least to an equal extent*, in whatever was done; for it is not to be overlooked that it has been adjudged that it was for *violation of duty on the part of that company* that its agreements with the Pullman Company were illegal and void. It was *its own* attempt to assign and transfer its property; *its own* abandonment of the conduct of its business; *its own act* in thus disabling itself from the performance of its public duty which made its agreements with the Pullman Company void, and *which has brought these parties to the actual situation in which they stand*. How can the Central Company upon that basis charge the Pullman Company with damages for such abandonment and interruption of its business, or for *the consequences of its own failure* to reassert its rights and resume its business? Even under the principles of the trust, which, as we shall see, is, under the decree of the Court, established and given operation in this case, such responsibility on the part of the cross-defendant is precluded. A *cestui que trust* can have no redress from a trustee for a breach of trust which the *cestui que trust* has acquiesced in or permitted without objection.

It is now very plain that:

The value of the total capital stock, estimated by the market price of certain shares, was no proper measure in 1870 of the value of such property.

The market price at which a few shares of stock appear to have been sold at or about the time of the making of this lease, was assumed as showing the value of the aggregate of all the shares of the capital stock of the Central Transportation Company. All experience, however, shows that nothing more untrustworthy could be assumed.

The price at which are sold a few shares of stock offered from day to day for sale, and which thus in small quantities change hands, is no criterion of the price which the market would pay for *the whole amount of the capital stock*. If, not a few shares only, but the whole stock had been at once thrown upon the market, there is no ground to imagine that it would all have gone for the price assumed.

Beyond all this the market price from time to time of shares of capital stock is *not evidence tending to show* the actual value of the assets and resources of a corporation. The Master, whose view was confirmed by the Court, said "the value of the stock on the street is a positive indication of the estimate placed on the property by the public," and, therefore, of its value (p. 86, *ante*). The "public" has no superior knowledge of such values. It is notorious that stocks fluctuate between wide extremes in the market within short spaces of time, and no indication of *actual value* is ever thought to be represented by the variable figures of the market. These market prices are usually governed by extrinsic conditions, and seldom by considerations of the actual value of corporate property. And it is notorious that the stocks of corporations actually insolvent are quoted for long periods at prices above par in the market.

In addition to all this, it is obvious that this total value of all the shares of capital represented *to the corporation itself* most important elements of value which it had no lawful right or power to *make the subject of alienation and transfer*. It could not furnish the consideration involved in the price represented by the total value of all its shares of capital stock *without including* all those franchises and other elements which were not susceptible of

transfer and sale, *or without including* in lieu of them the unlawful withdrawal from business, and abandonment of public duties, and the transfer of their performance to another corporation, and other illegal elements which could not lawfully be made the consideration of any contract whatever.

As has been shown, the lease, the assignments of contracts and all the acts of the cross-complainant under them were unlawful. They gave the Pullman Company no rights by transfer or otherwise which were obligatory on anyone. They bound neither the railways nor the State, nor the Central Transportation Company itself. The result is that the market price of a few shares of stock was *no evidence* of the market value of the total stock in a body; and however that might measure the value to the Central Transportation Company of all that *it had*, it gave no measure of the value of *what it could effectively transfer and secure* to the Pullman Company as its assignee.

Seventh.

It was error in the Court below to hold that the cross-complainant was entitled, under any circumstances or conditions, to recover earnings; and in not holding that the obligation, if any, of the cross-defendant was limited at all times to interest instead of earnings.

Of course, it is and has always been contended that the cross-complainant has no right to recover earnings at all, and that the obligation, if any, of the cross-defendant, is limited to interest instead of earnings or profits. The rule is thus stated in Sedgwick on Damages, Sec. 178:

“ If compensation is asked for destruction, that is, *for the whole value* of the property, it is *upon the theory* that the plaintiff's entire interest in the property ceased at the time of

the injury, and was replaced by *a right to have the value of the property in money*. Since, therefore, the plaintiff no longer has title to the property, he can no longer claim that he might make a future gain from it and his *recovery is limited to the value of the property at the time and place of destruction, with interest*. If the injury does not extinguish the plaintiff's title, he has a right to compensation for the loss of any use he might rightfully make of the property, *subject to the other general principles of the law of damages*."

See also Keener on Quasi Contracts, p. 166.

Where a plaintiff, therefore, asks for and takes judgment for "the whole value of the property," his recovery is necessarily limited to the amount of that money judgment with interest. We are here called upon and required to pay the "whole value of the property," which it is said was *received by us* in 1870. That value in 1870 was found by the Master. The Court declares that it was the same in 1885. "Upon the theory" by which *alone* the law permits recovery of "the whole value," the plaintiff would be entitled to *interest* on the judgment. But here the Pullman Company is required to pay all the earnings of its business to the Central Company from 1870 to 1885, and *interest thereafter* on the value fixed by the Master as of 1870, besides the capital sum represented by that valuation.

One cannot procure the substitution of the principles and methods of courts of equity for those of the courts of law by attempting in a court of equity to pursue a *legal title* to specific property, or to enforce a *legal right* to damages or compensation for its detention or for its destruction or injury (*Parsons v. Bedford*, 3 Pet., 433; *Scott v. Neely*, 140 U. S., 110; *Buzard v. Houston*, 119 U. S., 352; *Gordon v. Jackson*, 72 Fed. Rep., 87; *Kilian v. Ebbinghaus*, 110 U. S., 572; *Cates v. Allen*, 149 U. S., 451).

Even if it be assumed that to any extent whatever earnings might be recovered, the *total earnings*

made by the Pullman Company in the present case ought not to be given directly over to the Central Company, because it is not merely an uncertainty whether that company could have made those earnings, but the evidence and the report of the Master make it perfectly clear and certain it *could not have made them*. The evidence shows the railway companies were extremely dissatisfied with the equipment of the Central Company and *its conduct of the business*. "Their cars," said Mr. Scott, "were not satisfactory, and their business was not being done satisfactorily" (Rec., p. 1140). The equipment and the service were driving business away from the Pennsylvania lines to the lines of their competitors (Rec., pp. 1139-1140). The *railways were at that very moment devising this scheme to substitute the Pullman service and to get the management and the obsolete equipment of the Central Company off from their lines* (Rec., pp. 1139-1146). They would not, in any event, have permitted the Central Company to remain on their lines and continue there the business which they claim to have transferred to the Pullman Company. If the Central Company had been permitted to remain, it *could not have made the earnings* which the Pullman Company made; for, on the one hand, *it was at that time actually driving traffic from the railways upon which it operated*, and, on the other, the Pullman Company, by reason of its important connections, was *able to throw upon the lines* formerly operated by the Central Company *a vast amount of traffic* which would never have contributed to the earnings of the Central Company. The earnings made by the Pullman Company in its administration of the service are *no criterion whatever* of the earnings that would have been made by the Central Company had it attempted and been permitted by the railways to continue the conduct of its business.

The valuation made by the Master of the Central Company's so-called "property" in 1870, and which

has been adopted by the Court and embodied in the decree, was determined on the basis of its *earning capacity*; and the appraisal was greatly enhanced and placed above what would be the intrinsic value under ordinary circumstances because of an assumed *capacity of the company to make extraordinary earnings* by its use of the very small amount relatively of actual, tangible property in the particular case. The appraisal is based on a valuation of the Central Company's shares at 116 instead of a par value at 100. The *extra earning power*, as an element of value, is thus *capitalized at the outset in the appraisal*. If, therefore, interest should be given, *on the gross value thus capitalized*, the earnings would be represented in the capital and interest, its utmost rights would be in effect given to the cross complainant. To give this *enhanced* capitalization out and out in a gross fund, and then *accumulate the actual earnings* upon that also, is, clearly, to give those earnings *twice*. In such a case the primary valuation is grossly too large, and the simplest methods of mathematics indicate its *extreme injustice*.

If we are to be charged with and to pay over the actual earnings themselves, there ought not to be *also* an enhancement of the valuation of the property itself because of its *capacity to make those very earnings*. When the actual earnings are received the full benefit of that capacity to make them is also received.

Now upon what basis is the extraordinary rule of responsibility asserted here imposed upon the cross defendant? On what basis should it be chargeable in 1885 with the capitalized value in 1870 of contracts and other incorporeal elements, which became exhausted and consumed before 1885 in *making the earnings which are required to be accounted for* and paid to the cross complainant? All the earnings made in the operation of the service are given to the Central Company, though chiefly made, as the Master found, by the use of Pullman cars and

other property and Pullman capital. The Central Company is also exonerated from all that inevitable wear and tear and depreciation of the rolling stock and equipment which would have been inevitable in the hands of the Central Company if it had conducted the business. The Pullman Company, therefore, is required to give up all the earnings, without any compensation for its services, and also to bear all the burden of the maintenance and the ultimate loss of the physical property itself. A trustee guilty of breach of trust would not be subjected by a court of equity to such penalty and burden as this; but, in the actual situation of the parties, we insist that the Pullman Company should have been exonerated from all the loss arising from the inevitable depreciation or destruction of the physical property. Even in a case where a petitioner was held entitled to recover railway property delivered under a void contract of lease and to recover compensation for the use of its road and property, including depreciation caused by such use, no right was accorded to earnings and to indemnity against depreciation also (*Farmers' L. & T. Co. vs. Railway Co.*, 1 McCrary, 247).

It is an unreasonable and unprecedented ruling which charges the cross-defendant with the depreciation and consumption of property used in making the earnings which are accounted for and given to the cross complainant. The earnings should not be given where the property is thus charged. We ask, therefore, on what basis is this severe rule of responsibility imposed? Assuming that we ever acquired at all the property with which we are charged, we were not *as against the Central Company* wrongfully in possession of it. We did not seize and appropriate it, and we were not trespassers. We were never guilty of any wrongful conversion of it as against that company. We have never denied the Central Company's title nor refused to deliver the property on any demand; and there was never any demand made by that company

until this cross-bill was filed. Consider for a moment how we came in possession, if we ever did, of these contracts or came to have any relation whatever to them. They were put into our hands, if at all, by the cross-complainant itself. It was what the Central Company did in that respect that was beyond its powers, and was unauthorized and illegal; it was the act of the Central Company that was *ultra vires*. So far as the possession of any property was concerned, we were not wrongfully in possession as against that company. We have not appropriated anything violently or fraudulently; there has been no conversion. Nor were we purchasers under any contract to pay any capital sum on credit or otherwise. We took just what was *put into our hands voluntarily* by the Central Company, and if according to the warm argument of the Court below, anything was given us innocently by them, it was *as innocently received* by us. On what footing then is the result to stand which imposes upon us more than the penalties and hardships either of a party guilty of hostile and tortious conversion, or of a trustee guilty of a breach of trust? Only some wrongful assumption at the foundation, or some fallacious process of reasoning, can have led to a result involving such a false and partial view of the relation between the parties and to such injustice.

No right can exist to earnings made from the use of property *not already impressed with a trust* and where otherwise *no fiduciary* relation exists. Such fiduciary relation cannot arise except from *contract*, express or implied; and none can be implied from the mere possession or use of property. *Doyle vs. Murphy*, 22 Ill., 508; *Taylor vs. Turner*, 87 Ill., 302; *Wilson vs. Kirby*, 88 Ill., 572. This is involved in the assignments of error No 15, 18 and 26.

In *Root vs. Railway Co.*, 105 U. S., 215, it was claimed that a fiduciary relation arose as to the profits from infringement of a patent right, and

that the infringer was "by construction of law a trustee of the profits." But the Court said:

"The case is not within the principle, according to which, in certain circumstances, a court of equity decrees a wrongdoer to be a trustee *de son tort*, and exerts its jurisdiction over him in that character. Where a defendant has wrongfully intermeddled with property *already impressed with a trust*, he may be required as a trustee to account for it, as was done in the case of *People vs. Houghtaling*, 7 Cal., 348, because trust property may be followed, wherever it can be traced, into whose-soever possession it comes, except that of a *bona fide* purchaser without notice. It is the *character of the property*, and not the wrong done *in converting or withholding it, that constitutes the wrongdoer a trustee.*"

In *Monk vs. Harper*, 3 Edw. Ch., *111, the Court said :

"If the complainant has any *rights as authoress*, either of common law or under acts of Congress, and the defendants have encroached upon those rights by the publication of her book, she must sue them *at law* for damages. So, if they have possessed themselves of the stereotype plates which belong to her, an *action of trover or replevin* can be had. This Court will not entertain a bill for the purpose of *restoring to her the possession* of such articles of property, or of *compensating* her in damages for the deprivation. Nor does this bill, in my opinion, *make a case for an account* against the defendants *of the profits derived* by them from the printing and publication and sale of the work. *It does not show any privity of contract* or dealing between the parties; *no agreement expressed or implied by which the defendant can be held to account to the complainant for the profits of the work.*"

By the authorities, therefore, *no fiduciary relation arises* from the receiving, retaining or the use of property thus transferred; nor any more from

converting or withholding it, or from any tort in respect of it.

The decree, therefore, is erroneous which gives all the earnings to the cross-complainant, and applies these earnings in sufficient amount to extinguish all credits due the cross-defendant for the nearly four millions of dollars paid during the period of operation under the lease; for such a result can only be arrived at by raising a trust on an unlawful basis and for the illegal purposes of the void lease. This subject has already been alluded to, *ante*. The decree makes the cross-defendant a trustee for the performance of the services contemplated by the lease and of the earnings made thereby. It gives operation to all the principles that would be operative in the case of a lawful trust relation, and which can operate effectively only through the medium and methods of a trust.

This is illustrated in the conclusion that the Central Company was entitled to treat the Pennsylvania and Pullman railway contract of 1870 as a *substitute* for the various contracts subsisting between different roads constituting a part of the Pennsylvania system, which had been assigned to the Pullman Company (Rec., p. 1170). The lease and the assignments of those contracts were void and ineffective, and nothing whatever of *rights* created by them enured to the Pullman Company. The railway contract in question was made with the Pullman Company by the Pennsylvania Railway Company in 1870 for the fixed period of fifteen years.

But certain assigned contracts under which the Central Company had operated were wholly disregarded and were never acted under at all by the Pullman Company; and it is by holding these assigned contracts, including at least one of those contracts whose duration was held extended by force of the Legislative Act of 1870 to have been incorporated (Rec., p. 1170) by substitution in this Pennsyl-

vania Railway contract, that by process of *subrogation* the right of the cross-complainant is asserted to earnings *during the duration* of that contract, namely, the whole period of fifteen years to 1885. *One point of objection* to the holding that this Pullman railway contract of 1870 was, as to the Central Company, a *substitute* for its own contracts, is, that *this assumes* for its foundation the existence of a *lawful, equitable relation* created by their assignment between the Pullman and the Central Companies, out of which, by implication, contract could spring giving the Central Company a right of *subrogation* to the rights of the Pullman Company under its aforesaid railway contract of 1870. But as under the lease and assignments no rights were acquired by the Pullman Company, no fiduciary relation could arise out of that transaction in order to give effect by subrogation to the assignments, and so to the illegal purposes of the lease (Hill on Trustees, *45; *Curtis v. Perry*, 6 Ves., 739; *Nassau Bank v. Jones*, 95 N. Y., 124). Nevertheless, the relation assumed is one in which the Central Company is accorded the ordinary *right of election* of a *cestui que trust*. It is accorded a right to elect, whether it will enforce redress against the Pullman Company on the basis of its own original contracts, assuming them to have been assigned and used, or whether it will acquiesce in an alleged exchange, and take the benefit of the fifteen-year contract made between the railway company and the Pullman Company as a trustee.

So, also, as in cases of breach of trust by a trustee, it is given the ordinary election of a *cestui que trust* whether it will take interest on the value of all the property delivered to and used by a trustee; that is, the value of the original contracts of the Central Company, or whether it will take all the profits of the business done by the alleged trustee in the assumed use of the Central Company's rights under those contracts. On what principle are these rights of election founded?

On what principle are these forms of remedy, namely, subrogation and the taking of earnings, founded? What greater, or other, or *different right* would be accorded if a lawful assignment had created a *trust* of the contracts and of the *business*? What greater, or other, or different redress would be given if the Pullman Company were in fact an aggressive wrongdoer throughout, and the Central Company not *in delicto* at all?

It is the established rule, therefore, upon principle and authority, that where compensation is asked and allowed for property at its whole value, the law will proceed "upon the theory" that the original owner's interest ceases and is replaced by the money compensation. This principle involves the result that he has no longer title to the property, and his right is limited to recovery of its value in money with *interest*. Of course this is the only rule consistent with reason or justice; and this has at all times been the contention of the appellant.

Upon this subject, however, the Judge below, in his opinion (Rec., p. 1196), said:

"It is urged, however, that if the Pullman Company is charged with the property as of 1870, it must be treated thereafter as entitled to the earnings and be credited with the amount subsequently paid as rent. Of course *if it is* treated as *owner* from that date, it could not justly be held accountable for earnings thereafter, and would be liable only for the value, with interest from that date, subject to the credit stated. But *it is not* so treated, and cannot be, *because it would not correspond with the facts*, and would be unjust. The ownership of the property remained in the Transportation Company, the Pullman Company taking possession and holding it for the former, *paying a stipulated price for its use* up to 1885.

We hardly know from what direction to approach this statement. The actual *facts* were that the

parties made this contract or lease, or whatever it was "under *the guise* of a lease," and they intended to carry it out. The only action of the Court that would "correspond with the facts," would be such as would carry out this intention. But is it not true that in all cases coming within the rule just cited from Sedgwick on the Measure of Damages (*ante*, page 117), the Court attaches such *lawful* consequences to the facts as constructively the parties ought to incur, and by lawful implication contemplated? So property or business tortiously appropriated or destroyed must be paid for at its value when received or destroyed with *interest*. For the ownership of the property the law substitutes at that date a money demand with interest. It never raises an unlawful trust to effect an unlawful intention of the parties, on a theory that would "correspond with the facts." But that is precisely what the learned Judge below declares he will do. He says that "*of course*" if the Pullman Company is *treated as owner* from the time it received the property, it cannot be held accountable *for earnings*. But he says *it is not so treated*; that the ownership remained in the Transportation Company, the Pullman Company "taking possession and HOLDING IT FOR the former." Thus notwithstanding the judgment annulling the lease, the unlawful intention of the parties in attempting the void and illegal transfer, is to be *carried into effect*, because that, he says, would "*correspond with the facts*." Such is the plain declaration of the purpose of the Court below.

Now we submit that it was not within the authority of that Court to overrule or expunge the construction and judgment of this Court upon this very contract. But, apart from that, will it "correspond" any better "with the facts" to assume, the theory below, that the appellant was to carry on the business of the appellee as *its trustee or agent*? That it was to do so at *its own expense*, and give the appellee *all the earnings* made, whether *by use of its own capital and property* or

not? Does it "correspond with the facts" to assume that the appellant agreed ever to be an agent or trustee at all? Does it "correspond with the facts" to hold that the appellant *ever undertook to give earnings at all?* If there were no such facts, then why might not the Court as far as aught in the pretext it alleges goes, give *interest* instead of earnings? Did appellant in "fact" undertake, *in addition to* yielding all the earnings, that the railway contracts, which were merely rights for definite and limited periods to do business and make the earnings, *should not expire* by lapse of time, and that if they did the appellant would pay for them at a valuation capitalized at the outset? Did it undertake in addition to yielding earnings that the personal property—implements, carpets, blankets and cars—should not wear out and be consumed in the course of this service of making the earnings, and that if they did the appellant would maintain or restore them, or pay for them at their original value? Was it a fact that the appellant thus undertook, *without any compensation*, to perform all the railway service, uphold at its own expense all rights of property against lapse of time and the inevitable forces of nature, and *give over also all the earnings made in the service?* Could this morally impossible fiction, the most impossible fiction that ever distinguished the administration of injustice, ever seem for a moment in its absurdity to satisfy the mind of any one on the ground that it better *corresponded with the facts?* The Court below was *precluded* from assuming that the sums paid to the Transportation Company as "rent" were paid as a stipulated price for *the use of property* of any kind, and that the total amount should be extinguished as a credit by being offset against earnings during the fifteen years during which such payments were made. That Court knew that it had been held that the chief consideration for which these sums were paid was the unlawful covenant of the appellee that it would aban-

don and abstain from performance of the business for which it was incorporated. That Court had *itself* instructed the Master, that *for that reason* the rent reserved was not a measure of the value of what was demised. Nevertheless, it found a mode of extinguishing these sums altogether. The payments very far exceeded interest upon the valuation placed by the Master, under order of the Court, upon the entire plant of the Transportation Company in 1870. What in view of that fact the Court determined to do was to charge the appellant with all the earnings made during fifteen years, whether made by its own capital and cars or not, and arbitrarily assume that they were sufficient to exceed all the sums of money paid by the appellant upon any account whatever; and it is *by this process* that the Record shows it to have arrived at its decree.

Eighth.

The Court erred in this : that, while holding that it would treat the void lease as executed by the acts done by the parties "up to 1885," when it alleged the lease was disaffirmed, and that "to the extent its provisions were executed the Court would not interfere," it confined the rule to the mere receipt of earnings and to the payment of rental, and did not hold that other provisions of the lease were equally executed and were not to be disturbed, namely, the act of transfer and delivery of property under the lease, and the expiration and extinction of railway contracts and patents, so that they had no value in 1885.

By the proceedings before the Master it had become perfectly apparent that no actual earnings,

made by use of only Central Transportation property or capital on the original contract lines of that company and during the lifetime or duration of its several contracts, could possibly equal the amount of money which, in quarterly installments, had, during the fifteen years from 1870 to 1885, been paid as rental to the cross-complainant.

The cross-complainant claimed that it should be allowed all the earnings made by the Pullman Company during the entire fifteen years, though chiefly made by the use of Pullman cars and Pullman capital, merely making to that company an allowance for interest on its capital and for depreciation of its cars, and no other compensation for its performance of the service. But the Master considered that, for the reasons stated in the citation from his report, such a claim was unreasonable and unjust, and could not be supported.

The contention, moreover, of the cross-defendant was, as it now is, that when it is charged with the value of the property when it got it, whatever that value may be held to have been, it became thereby the owner of the property and liable thereafter only for interest on that sum until it was paid; and that it is not upon any known principle chargeable with *the earnings and use of the property itself*. But the *interest* on no conceivable valuation of the alleged property would equal the amount which had already been paid to the Central Transportation Company. Moreover, as this Court had declared, that annual payment was agreed upon and was made for a *far different* consideration from use of property, or from any other consideration that could be taken account of and appraised as "property" of the cross-defendant.

By neither of these processes, therefore, could these payments, amounting without computation of interest, as above stated, to \$3,960,000, be expunged. But by declaring in open contradiction of the Supreme Court that the whole sum paid as rental was "a stipulated price for the *use of the property*"

up to January 1, 1885; that although "the lease under which the parties acted was void, this did *not render the acts void*" (Rec., p. 1196); that provisions of the lease were *executed* by the parties up to 1885, and that "*to the extent* that its provisions were *executed*, the Court would not interfere"; and then by *confining the application* of this principle to the mere receipt of the earnings of the business on one hand and offsetting the entire amount of rental money paid on the other, the Court below could expunge the large excess paid as rental to the cross-complainant and leave the capital valuation of the property, whatever that might be, still to be paid to the cross-complainant unreduced by any credit, and with interest from 1885. Thereupon the Court declared that it would adopt that method. It declared that the amount to be paid by the cross-defendant was not, as it had *before* laid down, the valuation of the property in 1870, but its value in 1885, when it *asserted* that the lease was *repudiated* and the property *should have been returned*; that it would assume the valuation in January, 1885, to have been the same as in 1870, and that it *had directed* inquiry into the value of the property in 1870 *in order to fix thereby* the amount to be paid for it in 1885. But it is not true that the lease was repudiated or disaffirmed by the Pullman Company in January, 1885. The original bill in the very case he was deciding, which *asked aid of the Court to perform the lease*, was filed over two years later. But the coincidence may be observed that the payments of rental which made up the sum of \$3,960,000, which was to be exhausted are said to have ceased on January 1, 1885. By such process the present decree was settled.

But nothing of this was ever suggested or claimed by counsel for the cross complainant, nor were any of these matters ever argued or considered in the progress of the cause. No intimation was ever given that the value to be inquired into before the Master

upon the reference ordered was the value of property existing when the *lease was rescinded*, or that it was ever *in the mind* of the Court to fix *that* value when the inquiry was directed, and when the Court decided that *the measure* of compensation was "clearly" the value of the property *when it was received*. This opens for consideration, therefore, the application by the Court of the principle to which it changed, after the discussion of the Master's report, as furnishing the rule upon which *it had been* proceeding. It compels inquiry as to what was involved in treating as executed all that was done by the parties prior to the assumed avoiding of the lease in 1885, and as to *what acts are to be so held* to be executed, and it opens for the *first time* an inquiry into the value of the property in 1885.

If the acts of the parties under the lease up to 1885 are to be treated as executed, and not to be disturbed, why should that principle be confined to an account of the earnings made, in the conduct of the business by the cross-defendant, and to application in payment of those earnings of the sums of money paid as rental during that period? Why should not the rule be made to include all the *other* matters and things which had occurred and which had been completely performed and concluded, and which were *done in pursuance of the provisions* of the lease? Why should it not include *all* transactions *severally complete in themselves*, and of which nothing remained executory? Clearly, if this principle is made operative in this situation, it should include the *transfer of property under the lease*. Why was not the transfer of property as completely executed as the receipt of earnings or the payment of rental? It should certainly include all the *consequences* which were *inevitably incident* to the conduct of the business done, which the Court *does treat* as executed. It should include the depreciation and wearing out of the railway cars, or other personal property, which naturally occurred in the

conduct of the business and in the *executed* transactions of *making the earnings* thus paid over. It should include the extinction of the patent rights and of the contracts with railways for the running of cars, all of which regularly expired and by lapse of time ceased to exist, and were exhausted in making the earnings precisely as they would have been if the Central Company *had itself conducted the business*.

The truth is, the proposition invoked has no place here at all. When an "illegal purpose has been carried *into effect in a material part*," and "in a substantial manner" (*Kearley v. Thomson*, 24 Q. B. Div., 746); "where the parties have *so far* acted that they *cannot be restored to their original condition*" (118 U. S., 317), the Court "*will refuse to interfere*" at all unless relief can be given independently of the contract.

The same thing is essentially true of the railway contracts claimed to have been assigned. The contracts represented merely the *right to make the earnings on the railway companies' lines*. Being for fixed periods, day by day they diminished and became exhausted, and all had expired by December 30, 1882 (Rec., p. 1144). The transfer, exhaustion and expiration of these contracts constitute* a transaction as effectually executed, and as clearly within the principle applied, as any other conceivable act or transaction between the parties.

Ninth.

In holding the lease executed up to 1885 by the acts of the parties the Court erred in not holding the rental reserved and paid to have been an agreed and conclusive valuation by the parties, not merely of the USE of all PROPERTY for that period, but ALSO of the unlawful covenant of the lessor not to exercise its franchises; and the Court erred, therefore, in not holding that a part only of the rental paid should represent and offset the earnings under the lease, and that "the chief consideration for the sums paid" was the cross-complainant's covenant to abandon its business, and that the "chief" portion of the sums paid as rental should accordingly be otherwise applied to the credit of the cross-defendant.

In ascertaining value, estimates made by the parties themselves where these were *agreed* upon and appear, ought to be conclusive. It is obvious here that the parties agreed upon the rental reserved as the fair representative of the value of the *net* earnings to be made by the use of the resources of the Central Company transferred for that purpose, together with the other elements for which the cross-defendant was to make compensation.

If the lease is to stand as *executed* up to 1885 by the acts of the parties in the matter of offsetting earnings and rental only, it follows that only a part of the amount paid as rental was by the acts of the parties applicable to offset *net* earnings. By estimate and *agreement* of the parties, as well as by the construction of this Court, the "chief" part of the rental paid was paid on account of the consideration represented by the cross-complainant's covenant to abandon its business. The decision of this Court overruled the *express* contention upon that subject of the counsel for the Central Company in argument

(139 U. S., 37); yet that contention has become the present contention of the Court below. This rental cannot *be retained and given* to the cross-complainant *in gross* under another form and under *color of paying net earnings* arbitrarily assumed by the Court to have been sufficient to absorb the whole amount paid by the cross-defendant. Only a *part* in any case can be lawfully applied upon earnings. Consideration should in some degree have been given to the judgment of the Supreme Court, which had construed the lease and held that the rental paid was only *partly* for the *use of property*; and it was *error* not to apply the "*chief*" part of the amount paid as rental as a credit upon whatever amount the cross-defendant should otherwise be adjudged to pay.

Tenth.

The Court erred in its decree by adopting the valuation of property made by the Master as of 1870, based on market value of the total capital stock as the measure of value of the Central Company's property in the hands of the cross-defendant in 1885, without any reference to a Master to make the inquiry, or other opportunity given the cross-defendant to show the actual value of said property or the actual market value of said capital stock in 1885.

The considerations which have already been submitted establish that there should have been no decree for the appraised value in 1885 (when it is incorrectly assumed that the lease had been disaffirmed), of any property, tangible or intangible, which had ceased to exist without fault of the cross-defendant or been consumed and used up in the conduct of the business. There could lawfully be, in such case, no

decree except for the payment for or return of what property had not been so expended in making the earnings. That is the only result consistent with the theory of the Court upon which earnings are given by the decree to the cross-complainant.

If the valuation in 1870 is adopted as a basis of responsibility and of the decree, it is inevitable that that valuation should be reduced by the amount it included for contracts and patents expired, for contract lines of railway which, like the Baltimore and Ohio system, had withdrawn altogether on the expiration of their contracts, and by allowance for the exhaustion and depreciation of tangible property. This leads to the same result, simply the mere return of all property remaining on hand not consumed in the course of the business. Arriving at this logical result from every starting point proves that it is the only one consistent with the hypothesis upon which the decree is founded.

For another and conspicuous reason the valuation made of property of the Central Company in 1870 could not be a proper measure of the value of what remained of that company's property in 1885, assuming the constituent elements of the property to have been such as were designated by the Court. In 1885 the contracts with the railways making up the great Baltimore and Ohio system had long before expired, and for a number of years the Baltimore and Ohio system of roads had ceased to be operated by the Pullman Company either under contracts originally assigned by the Central Company or under any others which, by substitution or otherwise, may be held to have succeeded to them. It requires no argument to indicate that the contracts embracing that great system, therefore, had a value in 1870, under the rulings of the Court below, which had altogether ceased to exist in 1885, and a value too great to be disregarded in the estimate of value.

Moreover, in January, 1885, the contract expired which the Pennsylvania Railway had made with the Pullman Company in 1870. That contract the Cen-

tral Company claimed had been made in part at least in exchange and substitution for some of its original contracts assigned to the Pullman Company. The Pennsylvania Railway refused to renew this contract. Subsequently a new contract of far less value was made between that Railway Company and the Pullman Company under the circumstances detailed in this original bill, and by agreement it was made to relate back and cover the period following the expiration of the former contract. But for a considerable period there was no contract between those parties. When that Pennsylvania contract expired the last of the Central Company's contracts was gone. If there was an exception it was too insignificant to be considered; and the statement of the opinion below that the value of the property in 1870 should be taken as its value in 1885; that "*presumably the value increased; the evidence fully justifies the presumption*" is enough to overwhelm with astonishment any one who knows anything of the evidence and of the record.

It is plain, therefore, that all these elements, namely, the depreciation of the physical property, the expiration of the patent rights, and the expiration of the contracts should be applied to reduce, by their *total*, the valuation in 1885 from the valuation made in 1870, which included them. The valuation made in 1870 was no lawful measure of the responsibility of the cross-defendant in 1885.

Manifestly, therefore, opportunity should have been given the Appellant to show the value of the "property" in January, 1885. We should otherwise have been advised by some intimation when before the Master that it was really the value in 1885 which he was to ascertain. When the Court instructed the Master that the "measure of compensation" was "*clearly the value of the property when received*" we did not know, nor did the Master, that he *then meant* by that the value *when the property should have been returned* in 1885, upon disaffirmance of the lease; nor did we understand

that he had directed the value of the property *when received* in 1870 to be ascertained, solely because it would have been difficult for the Transportation Company to ascertain the value in 1885 except by reference to that value in 1870. With all due respect we submit we were not gravely in fault for not gathering this intent of the Court from the indications given. It was error in the Court to thus change its position abruptly without further reference to the Master or giving other opportunity to show the changes in the "property," and in its condition and value, and, if material, to show the market value of Central Transportation Company's stock on January 1, 1885.

It was error also for the Court to assume arbitrarily a matter, disproved in the evidence, that the 1st of January, 1885, was a date on which the lease was disaffirmed by the Pullman Company, and consequently *the* date on which the "property" should have been returned. He had himself entered judgment for installments of rent accruing in 1885, in cases tried by himself in June, 1886, in which the validity of the lease was not questioned (139 U. S., 64). The original bill in the case he was deciding asked aid in affirmance of the lease, and was not filed until January 25, 1887. The suit in which the lease was disaffirmed was tried before him, and was not *begun* till September 21, 1886. January, 1885, had no significance except as the date when it was assumed the payments ceased of rental proposed to be set against earnings received and wiped out at that date as executed transactions. This was error, for at least it made a difference of about two years' interest on about two and a quarter millions of dollars in favor of the cross-complainant.

Eleventh.

The Court erred in confirming the finding of the Master that certain railway contracts belonging to the Central Company, originally made to continue "during the continuance of the incorporation" of that company, were continued in force and extended for ninety-nine years by force of an act of the Legislature of the State of Pennsylvania, of the 9th of February, A. D. 1870, by which said Central Company was given a corporate life for another period from the expiration of its then existing charter; and the Court erred in not upholding the claim of the cross-defendant that such effect of said legislative act was in conflict with and forbidden by Article I., Section 10 of the Constitution of the United States, which prohibits on the part of the States any enactment impairing the obligation of contracts.

The Central Company was incorporated under the Act of the 7th of April, 1849, a general law for the incorporation of manufacturing companies, and its corporate life was limited to twenty years by that charter, which term expired on December 30, 1882. The railway contracts were made while the terms of that charter, and of no other, were in force. Afterwards, on the 9th of February, 1870, the Central Company procured a special act of the Legislature of Pennsylvania by which the Central Transportation Company *eo nomine* was given a corporate life for a period of ninety-nine years from the time of the expiration of its then existing charter under the general law. It is claimed by the Central Company that this special legislative act operated to extend for the same period of time the existing railway contracts which had been made to run "during the continuance of the incorporation" of the Central Company, and the Master so found (*Rec.*, p. 1170), and

his conclusion upon that subject the Court has confirmed and adopted, expressly overruling an exception of the cross-defendant on that ground (*Rec.*, p. 1191). The *conclusion* is that such was the legal effect and operation of the Act of 1870, and that, moreover, the legislative authority finds confirmation for that in the provision of the Act of 7th of April, 1849, the general law above mentioned, which reserved power to the Legislature to alter or amend that statute. These conclusions are contested by the cross defendant for several reasons:

FIRST.—The special Act of 1870 in no wise purports to be an amendment of the General Law of 1849. An amendment of that statute would apply to and affect the law throughout its entire operation, and, if it applied to corporations existing at the time of the amendment, would apply to all such corporations alike. The Act of 1870, however, was a special act limited by its express terms to the Central Transportation Company, conferring upon it new powers and giving it new and independent term of corporate life for a future period of ninety-nine years. Under that act, that company acquired for the first time corporate right to conduct the ordinary sleeping-car business. It will not be pretended that, as an amendment to the general law, the special powers given by the Act of 1870 to the Central Transportation Company were conferred upon and enured to all the corporations existing under authority of the Act of 1849. Until the Act of 1870 was passed, the Central Transportation Company was incorporated as a manufacturing company merely, under the provisions of the Law of 1849. The mere recital in its articles of association of its purpose to carry on a business of railway transportation could not originate a power not included in the terms of the statute (*People ex rel. v. Chicago Gas Trust Co.*, 130 Ill., 286). In argument in the Court below and in the Supreme Court, 139 U. S.,
 , it was strenuously contended on behalf of that

company that it was merely a private manufacturing company, and was charged with no public duties which were violated by the lease of the Central Transportation Company; and, apart from the Act of 1870, that was perhaps true. But the Act of 1870 was held to have conferred upon that company the corporate power to conduct the public business of transportation, and to have confirmed the power which it had been assuming without legal authority to exercise, and charged it with the corresponding burden of public duties; but certainly it will not be contended that, as an amendment to the general law, it fastened that power and charged those duties upon all the corporations incorporating under the Act of 1849.

SECOND.—The Act of 1870 was procured by the Central Transportation Company, and it is denied that the Legislature of Pennsylvania had power, *without the consent of the several railway companies*, to arbitrarily extend the term of the contracts which they had made with the Central Company. If the Act of 1870 is construed to have that legal effect, then we insist that the act so construed is itself void, as being in conflict with that provision of the Constitution of the United States which inhibits on the part of the States any enactment impairing the obligation of contracts. (Cons. U. S., Art. 1, Sec. 10, Cl. 1). A corporate charter is a contract with the State. The term of corporate life is a part of such a contract. The charter is a contract for precisely what is affirmatively granted and no more. The Central Transportation Company was given a corporate life for twenty years. At the time its railway contracts were made it was entitled to that term of corporate life; and it had no shadow of right to more. That grant of corporate prerogative was a contract with the State, and the railway agreements were *independent* contracts between the parties to them, *founded on that with the State and limited by its limitation*. Any

grant of additional corporate life must be the result of a *new contract between* the State and the Central Company, by which the existing contracts with the railways could not be affected without a new agreement to that effect with them. Laws existing at the time of the making of a contract enter into the contract as a part of it; and laws impairing its obligation are unconstitutional, or *they cannot be applied to* the contract previously existing (*McCracken v. Hayward*, 2 How, 612; *Ogden v. Saunders*, 12 Wheat, 256).

The effect of the Act is to extend those otherwise expired contracts over the whole period of fifteen years, and thereby to support by them the claim to all the earnings during that entire period. The contracts thus extended *enter also as contracts of that duration into the valuation of property* said to have been transferred in 1870. Neither that valuation nor the result as to earnings could be supported without the alleged operation of the legislative Act of 1870 in extending the duration of the existing contracts.

Twelfth.

The Court erred in holding the cross-defendant to have been derelict in that it had refused or neglected to produce to the Master in evidence all earnings called for by order of reference; and in holding that the cross-defendant had failed or refused to disclose earnings called for by the Master under authority of said order of reference; and in assuming arbitrarily that the burden of proof was upon the cross-defendant to show that the earnings were less than the rental paid; that the parties to the lease intended that the use and rent should balance each other, and that in the absence of proof to the contrary, it should be presumed they did.

On this proposition that the cross-defendant was thus derelict the Court below declined to amplify or explain its order of reference on the points upon which differences had arisen before the Master, but confirmed the report of the Master as to what constituted the property transferred in 1870, and his method of valuation of it. The Court arbitrarily assumed that the value then sufficiently indicated the value fifteen years later, in 1885, when the property had almost entirely passed out of existence; asserted,—without evidence, and in the face of the Master's report that without more evidence than had been adduced upon the order of the Court as it stood it was impossible to ascertain the actual earnings, and that "it would be idle to speculate upon the result of such testimony when adduced,"—that the earnings during fifteen years from the use of cross-complainant's property had been at least equal to the total amount of money paid under the lease upon any consideration whatever; that if not so the burden of proof lay on the cross-defendant who should have shown it; and by this process arrived at the present decree.

We deny that the cross-defendant has been thus derelict. We deny that in a suit like this, for the recovery of property and damages, the *burden of proof of value can be imposed* upon the cross-defendant; and we deny that the claim of cross-complainant is to be upheld *except so far as it is affirmatively disproved* by the cross-defendant. We deny that it has failed to comply with and to conform in all respects to the order of the Court as made, and insist that the suggestions to that effect are entirely unfounded and are therefore quite inadequate to give the needed plausible complexion to the reasonings which are adduced by the Judge below to sustain the action of the Court or its decree.

The facts which are shown connected with this subject by the Record and the Master's report support this contention.

It appears in the Record, at page 867, that the

counsel for the Central Company had addressed a letter to the Master requesting the production of certain papers, which letter was transmitted to the Pullman Company; but the Master has not incorporated it in his report, nor has it ever been made, at any place, a part of the Record. All that the Record shows on the subject is as follows:

At page 867, upon attention being called to the request by counsel, we stated that we regarded it as an extension of the order of the Court in a material degree, and would for the present decline to furnish the statements demanded until the order of the Court should be made sufficiently specific to call for them. We had already furnished to the Master (p. 866) all the earnings of Central Company cars, wherever made, insisting that the order of the Court, properly construed, called for nothing more.

At page 872 counsel called upon us to produce the analytical statement books kept after August 1, 1874, and we declined to do so, for the reason above given. Counsel at the same time asked for a statement of the earnings and expenses of the Central Transportation division of the Pullman Company, from January 1, 1870, to April 1, 1872, which we presented the next day, at page 895.

At page 879 our accountant, under the Master's ruling, made answer to a question to which we objected for the reason stated above. At page 881 we entered a general objection to the line of the cross-examination of our accountant, but did not restrain his replies.

At page 881 counsel again called upon us to produce the analytical statements of the Pullman Company for the ten years.

At page 882 counsel called upon us to produce a statement showing the gross and net earnings made by the Pullman Company after 1870 by the operation of cars under the sixteen contracts. We declined to do so, except upon the order of the Master, and then subject to objection for the reason above given. The Master made no order, but the next day, without any further call or any order, we, at

page 883, produced the analytical statements called for by the Master's letter and by counsel at pages 867, 872 and 881, we expressly stating that they were produced in compliance with the call of counsel and the request of the Master; and their production was tacitly accepted by both the Master and counsel as such compliance.

We then produced, at page 895, the two statements called for at pages 872 and 882, one of them being a statement showing the result of the operation of sleeping cars over the territory covered by the sixteen contracts from January 1, 1870, to the expiration date of each contract. We expressly stated this to be in compliance with the call of counsel of the day before (at pp. 872 and 881), and it was not suggested that it was not a compliance; and we supposed the call to be the same as the first of the two calls in the Master's letter, and that we had given all the statements asked for.

We are confirmed in this supposition by the fact that IN HIS REPORT the Master asked for additional statements, as necessary to complete his report. They were NOT *however, statements we were asked for at the hearing* before him. *All such were given him.* But they were statements which *would be pertinent only if* the conclusions reached by him after the hearing before him, and during his consideration of the case, and first announced in his report, were correct, namely, *first*, that the special act of the Legislature of Pennsylvania, extending the corporate life of the Central Transportation Company, had the effect of extending also the duration of contracts of that company with various railway companies which were limited to last during its corporate life, and were made at a time when its corporate life was limited by law to a certain date, namely, December 30, 1882, and, *second*, that the Pullman Company is bound to account for the earnings made on certain railways with which the Central Transportation Company had no contracts whatever.

Thus the report of the Master shows that these

were the only supplemental statements asked for by him. He did not ask for either of them *at the hearing*; and we insist that the holding of the Court, in its opinion and order made upon the Master's report, that we had been derelict and had refused to conform to the provisions of its order of reference, and had withheld evidence or information called for thereby, and that it was *consequently to be presumed against* the Pullman Company that the earnings made under the Central Transportation contracts by the use of its property were greater than the sums of money paid as rental to the cross complainant, or the Pullman Company would have shown it, was wholly without foundation and unjustifiable, and that the decree is erroneous which is based upon that assumption.

The Court arbitrarily assumed without inquiry, but in the face of abundant evidence to the contrary in the Record, that the value of the Transportation Company's property in 1870, as appraised under its order by the Master, was a proper measure of the value of what remained of that so-called property in 1885. No order of the Court had ever directed inquiry into that value or intimated the purpose of the Court in that direction. No opportunity was ever given the cross-defendant to show either the value of what remained of that property in 1885 or the market value of the stock of the Central Company at that date. Notwithstanding this, the Court, upon this wrong foundation, charged that the Pullman Company had been derelict in failing to conform to its order of reference, and said, concerning the value of the Central Company's property in 1885, as follows (Rec., p. 1196):

" Presumably the value increased; the evidence fully justifies the presumption. *If it decreased, the Pullman Company could and should have shown it.* The Master's valuation in 1870 is, therefore, to be taken as the value in 1885, when the property should have been returned."

We submit that the flagrant injustice and wrong involved in this language cannot be too strongly expressed. We did not refuse to conform to the order of the Court. The evidence and the Record do *not* show that the value of the property appraised in 1870 increased during the succeeding fifteen years. The Court never did direct or *suggest* an inquiry into the value of the property remaining in existence in 1885. The Record indicates that the idea never arose until after the coming in and the discussion of the Master's report. The assumed foundation of fact upon which this language of the Court is based *did not exist*, and we submit that the language and conclusion of the Court were wholly unjustified and that the error in the decree based thereon is flagrant.

Finally, if the cross-defendant is charged with the property when delivered in 1870, it should be charged only with interest upon a true valuation of it at that time, and credited with the sums of money which it has from time to time paid, with proper computations of interest.

If it is to be charged with earnings made before the lease was disaffirmed, then it should be holden only to surrender whatever property remained on hand at *that* time. That time *was not* the 1st of January, 1885, and there is error in the decree in that respect. It should not be charged with anything for the value of incorporeal rights, patents or contracts, nor for waste or depreciation of property; because any loss which has accrued has occurred with the concurrence, acquiescence and fault of the cross-complainant, and also because all these contracts or patents, or other incorporeal rights, were consumed in making the earnings.

By the *hypothesis* upon which the Court proceeds in giving the earnings of the business to the cross-complainant, the cross-defendant *held* the property and *applied* it for the *use* of the cross-complainant, and it should bear the loss inherent in the operation of the service precisely as if it had conducted the business personally or by ordinary agents.

If the cross-defendant is holden to account in 1885 for the value of all the property which the Central Company had in 1870, and its value in 1870 is made the measure of value in 1885, the amount of that valuation should be reduced by the amount of what it may have included on account of the contracts and patents which expired in the course of the business, and by the amount of all the waste and depreciation of tangible property which occurred.

But we insist that the cross-defendant is not amenable to the demands of the cross-bill. The contract of lease and the acts of the cross-complainant created a situation in which, under their settled rules, the courts of the United States refuse to interfere, but leave parties where they have placed themselves. They decline to interfere for either party when contracts are void because of vicious or immoral covenants or considerations; and *covenants are of that class* which are void for restraint of trade or other flagrant violation of public policy.

The rules which have been applied below in the present case are not supported, nor can be vindicated either by facts from the Record or by any recognized legal principle; and the result is equally without justice and without precedent.

Finally we urge with respect that the decree below ought to be reversed, and the cross-bill and the original bill dismissed. But if upon any ground we are responsible in any degree to the appellee another reference should be ordered to the Master to ascertain the measure of that responsibility under instructions to be indicated by this Court.

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